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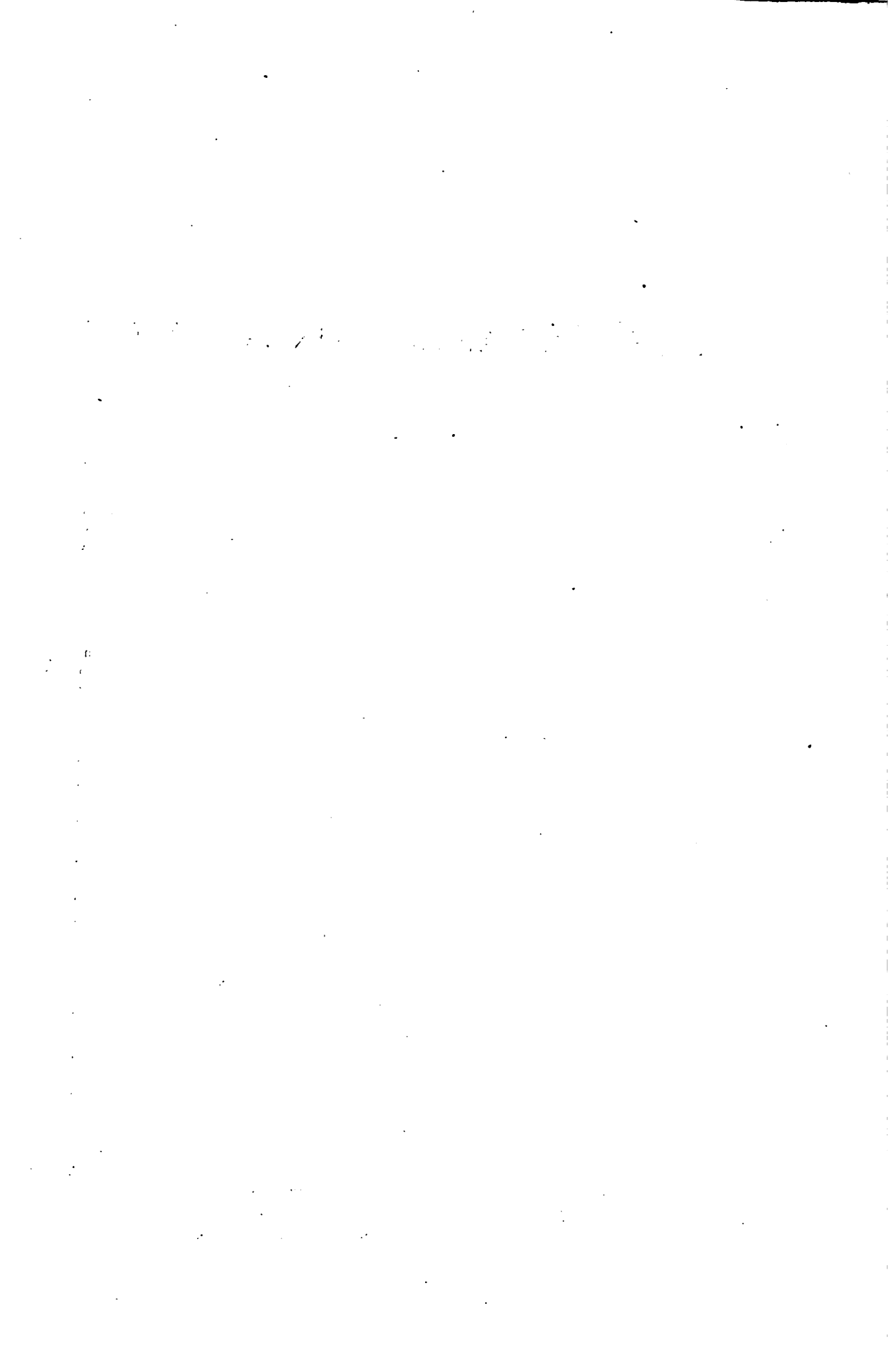


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THE ARREST OF HIS PRINCIPAL BY THE BAIL MAY BE MADE IN ANOTHER STATE THAN WHERE THE BOND IS GIVEN AND THE BAIL MAY TRANSFER HIM THERETO WITHOUT INFRINGING HIS RIGHT UNDER THE FEDERAL CONSTITUTION TO DUE PROCESS OF LAW.

The relationship of a bail and his principal arises out of the relationship the parties have established between themselves, and not by a court process, so that, a bail making the arrest of his principal anywhere he finds him, in the United States, is justifiable. An interesting case of this sort is that of *In re Von der Ahe*, 85 Fed. Rep. 959. Chris Von der Ahe is a picturesque character in St. Louis; gained great notoriety as the president of the victorious "Brown Sox" base ball team, captained by Charles Comiskey, now president of the "White Sox" team of Chicago. It seems that Chris got into trouble in Philadelphia whereby an action of trespass for malicious prosecution was brought against him under the laws of Pennsylvania, in Allegheny County. Chris was arrested by virtue of a *capias* and taken into custody. To procure his release, he secured one, Nimick, to "go his bail." The condition of the bond was that he (Von der Ahe) "shall satisfy the condemnation money and costs, or surrender himself into the custody of the sheriff of Allegheny County, or in default thereof, that said W. A. Nimick, the above named bail, will do so for him." Chris was released, but the case went against him, and was finally affirmed in the supreme court. Under the Pennsylvania practice, it is notable that the bail may discharge themselves by a surrender of the principal at any time prior to fourteen days after the service of the *scire facias*, or summons, issued after the termination of the action, and upon the execution of

the bond, "it shall be lawful for the bail therein, to have, from the officer by whom it is taken, a bail price," etc. Chris, having failed to pay the judgment or surrender himself to the sheriff, Nimick, the bail, on February 3rd, 1898, took out a bail piece, duly and properly certified. By indorsement thereon, Nimick authorized Bendell, the respondent, to execute the same, and in his "behalf, to take, seize and surrender to the sheriff of Allegheny County, Pennsylvania, said Chris Von der Ahe." In pursuance of such authority, Bendell subsequently came to St. Louis, having secured assistance, seized Von der Ahe on the street, and by main force, put him into a hack and, despite Chris' cries for help, he was carried to the depot and placed on the cars. Several attempts were made on the way to Pennsylvania to take Chris from the bail, but were futile, and he was, by main force, delivered to the sheriff of Allegheny County, Pennsylvania.

Thereupon Chris sued out a writ of *habeas corpus*, alleging that he was a citizen of the state of Missouri, "that no legal proceedings, if any such, could have been had, were begun to warrant any such arrest in the state of Missouri, and that contrary to article 5 of the amendments to the constitution of the United States, he was deprived of his liberty without due process of law. The court said: "Of late years we have grown so accustomed to the proceedings by requisition that we have come to regard it as the only means by which a person can be removed from one state to another. An examination of the authorities, state and federal, shows, however, that, under certain circumstances, bail have the right to arrest their principals, wherever they find them, and remove them from the forum from which they have been released, and to which they have obligated themselves to surrender. By these authorities it would seem settled that when one is arrested, and bail is given, such principal is regarded as delivered to the custody of the bail; that the bail has a right to arrest or take the principal into

custody at any time or place in order to surrender him; that such arrest is not, by virtue of the process of the court, but is the exercise of a right arising from the relation between the parties; that the bail piece is not the authority for such arrest, but is simply evidence of the relationship between the parties. Such being the distinctions clearly drawn in the decisions, it will at once be seen that there is a fundamental difference between the right to arrest by bail and arrest under warrant, where such right to arrest is based upon a court process, which, *per se*, can have no extra jurisdictional power or efficacy." The arrest of the principal by the bail is based entirely upon the relationship fixed between the parties themselves, consequently, as between them, is confined to no locality or jurisdiction. A clear and concise statement of the authority of the bail to arrest, is found in the case of *Worthen v. Prescott*, 60 Vt. 72, 11 Atl. Rep. 690, where the court says: "The authority arises more from contract than from law; and as between the parties, neither the jurisdiction of the court nor of the state controls it; and so bail may take the principal in another jurisdiction or another state, on the ground that a valid contract made in one state is enforceable in another, according to the law there. This shows that the authority need not be exercised by process, but that it inheres in the bail themselves."

The Supreme Court of the United States, in *Taylor v. Taintor*, 16 Wall. 371, says: "When bail is given, the principal is regarded as delivered to the custody of his sureties. Their dominion is a continuance of the original imprisonment. * * * They may exercise their rights in person or by agent. * * * They may pursue him into another state; may arrest him on the Sabbath; and, if necessary, may break and enter into his house for that purpose. * * * The bail have their principal on a string, and may pull the string whenever they please and render him in their discharge. The rights

of bail in civil and criminal cases are the same."

This is sufficient to present this interesting question in its various phases, and if any one desires to go further into the matter he will find much in the principal case as well as in *Toles v. Adees*, 84 N. Y. 222-240; *Worthen v. Prescott*, 60 Vt. 68.

NOTES OF IMPORTANT DECISIONS

COMMERCE—INTOXICATING LIQUORS—MUNICIPAL LICENSE—WILSON ACT.—Recently the supreme court of the United States had before it the question of whether or not a municipality may subject to a special license liquor brought in from another state and sold in the original package. The case was that of *Phillips v. City of Mobile*, 28 Sup. Ct. Rep. 370. The case was originally brought in the city court of Mobile, where the finding of the court on an agreed statement of facts was against the city. An appeal was taken to the supreme court of the state of Alabama, which reversed the lower court, and remanded the case. From this judgment of the supreme court of Alabama, error was brought in the supreme court of the United States. In sustaining the Alabama court the supreme court of the United States speaks as follows:

"The sale of liquors is confessedly a subject of police regulation. Such sale may be absolutely prohibited, or the business may be controlled and regulated by the imposition of license taxes by which those only who obtain licenses are permitted to engage in it. Taxation is frequently the very best and most practical means of regulating this kind of business. The higher the license, it is sometimes said, the better the regulation, as the effect of a high license is to keep out from the business those who are undesirable, and to keep within reasonable limits the number of those who may engage in it. We regard the question in this case as covered in substance by prior decisions of this court." Citing *Vance v. W. A. Vandercook Co.*, 170 U. S. 438, 446, 42 L. Ed. 1100, 1103, 18 Sup. Ct. Rep. 674; *Reymann Brewing Co. v. Brister*, 179 U. S. 445, 45 L. Ed. 269, 21 Sup. Ct. Rep. 201; *Pabst Brewing Co. v. Crenshaw*, 198 U. S. 17, 25, 49 L. Ed. 925, 928, 25 Sup. Ct. Rep. 552; *Delamater v. South Dakota*, 205 U. S. 93, 51 L. Ed. 724, 27 Sup. Ct. Rep. 447.

Continuing, the court says: "Even where the subject of transportation is not intoxicating liquor, this court has held that goods brought in the original packages from another state,

having arrived at their destination, and being at rest there, may be taxed, without discrimination, like other property within the state, even while in the original packages in which they were brought from another state." *American Steel & Wire Co. v. Speed*, 192 U. S. 500, 48 L. Ed. 538, 24 Sup. Ct. Rep. 365..

FOREIGN CORPORATIONS — PLEADING CAPACITY TO SUE — SUFFICIENCY OF COMPLAINT.—That a foreign corporation bringing suit in a state court other than that of its domicile, must allege among other things that it has obtained a license to do business within the state, where the laws of the state require it to obtain such a license, is held in *Portland Company v. Hall & Grant Construction Company*, 108 N. Y. Supp. 821. In that case a foreign corporation brought suit within the state of New York, and omitted to allege that the corporation had complied with the New York statute with regard to the licensing of foreign corporations. The court says: "It has been held that a complaint in an action brought by a foreign corporation to recover upon a contract made within this state, which fails to allege that the plaintiff has received a license to do business within this state, under Section 15 of the general corporation law, does not state a cause of action." Citing *Wellsbach Co. v. Norwich Gas & Electric Co.*, 180 N. Y. 533, 72 N. E. Rep. 1152, wherein it was held that in an action by a foreign corporation to recover upon a contract made within the state of New York that if the complaint failed to allege compliance with said section it would be demurrable.

MAY A STATE IN THE EXERCISE OF THE POLICE POWER, PROHIBIT THE USE OF THE NATIONAL FLAG FOR ADVERTISING PURPOSES?

"*Salus populi suprema lex.*" In this maxim of the law, perhaps more than in any other, is found the justification for the exercise of what is known as the "police power" of the state. No expression in the law is more difficult to define or limit than this expression, the police power. It is impractical, if not impossible, to definitely prescribe the limits of the police power by any general rule or definition.¹ As Chief Justice Shaw, the distinguished jurist, said in *Commonwealth v. Alger*:² "It is much

easier to perceive and realize the existence and sources of the police power, than to mark its boundaries, or prescribe limits to its exercise."

In this article no attempt will be made to discuss this power in its many phases. The observation of Mr. Justice Bradley³ at this point will give us as accurate a definition of this intangible power as can be found: "Whatever differences of opinion may exist as to the extent and boundaries of the police power, and however difficult it may be to render a satisfactory definition of it, there seems to be no doubt that it does extend to the protection of the lives, health and property of the citizens, and to the preservation of good order and the public morals."

It will be admitted by all that the state, in the exercise of its police power, may constitutionally enact laws calculated to promote the health,⁴ comfort,⁵ safety⁶ and morals⁷ of society. Courts differ as to what regulations are necessary to promote these things but in general agree that the police power properly extends to the regulation of certain professions such as dentistry⁸ and plumbing,⁹ the regulation of dairies,¹⁰ cemeteries,¹¹ gas works,¹² smoke,¹³ and

(3) *Boston Beer Co. v. Mass.*, 97 U. S. 25.

(4) *Vlemelster v. White*, 179 N. Y. 235, 72 N. E. Rep. 97; *Jacobson v. Mass.*, 197 U. S. 11, 49 L. Ed. 643; *State v. Rabb (Me.)*, 60 Atl. Rep. 875.

(5) *Glucose Refining Co. v. Chicago*, 138 Fed. Rep. 209.

(6) *Kibbe v. Stevenson*, 136 Fed. Rep. 147.

(7) *Mugler v. Kansas*, 123 U. S. 623, 8 Sup. Ct. Rep. 273.

(8) *State v. Chafman*, 69 N. J. Law, 464, 55 Atl. Rep. 94; *Ex parte Whitley (Calif.)*, 77 Pac. Rep. 879.

(9) *State v. Justus*, 90 Minn. 474, 97 N. W. Rep. 124.

(10) *Fischer v. St. Louis*, 194 U. S. 361.

(11) *Odd Fellows Cemetery Assn. v. San Francisco*, 140 Calif. 226, 73 Pac. Rep. 897.

(12) *Dobbins v. Los Angeles*, 139 Calif. 179, 72 Pac. Rep. 970.

(13) *St. Paul v. Hangbro (Minn.)*, 100 N. W. Rep. 95.

(1) *Calif. Reduction Co. v. Sanitary Reduction Works*, 126 Fed. Rep. 34.

(2) 7 Cush. (Mass.) 84.

weeds;¹⁴ requiring the vaccination of children attending the public schools;¹⁵ prohibiting the explosion of firecrackers;¹⁶ prohibition of the sale or manufacture of intoxicating liquors within the state;¹⁷ the regulation of pool rooms,¹⁸ etc. Innumerable other instances of the exercise of the police power could be given, but to no purpose.

The interesting and important question now arises, may the state, in the exercise of the police power, prohibit the use of the national flag for advertising purposes? In various states of the Union¹⁹ statutes have been enacted preventing and punishing the desecration of the flag of the United States. These statutes, among other things, make it a misdemeanor to sell, expose for sale, or have in possession for sale, any article of merchandise upon which shall have been printed or placed for purposes of advertisement, a representation of the flag of the United States. While over half of the states have enacted such statutes, it may be observed that congress has established no regulation as to the use of the flag, except that regulation contained in the Act of 1905, authorizing the registration of trademarks in commerce with foreign nations and among the states, "unless such mark consists of or comprises the flag or coat of arms, or other insignia of the United States or any simulation thereof."²⁰

(14) *State v. Boehm* (Minn.), 100 N. W. Rep. 95; *St. Louis v. Galt* (Mo.), 77 S. W. Rep. 876.

(15) *Viemelster v. White*, supra; *French v. Davidson* (Calif.), 77 Pac. Rep. 663.

(16) *City of Centrailla v. Smith* (Mo.), 77 S. W. Rep. 488.

(17) *Mugler v. Kansas*, supra; (and cases cited).

(18) *City of Louisville v. Wehmoff* (Ky.), 79 S. W. Rep. 201.

(19) Arizona, Colorado, Connecticut, California, Delaware, Idaho, Indiana, Illinois, Kansas, Maine, Massachusetts, Maryland, Michigan, Minnesota, Missouri, Montana, New Hampshire, New York, North Dakota, Nebraska, Ohio, Oregon, Rhode Island, Utah, Vermont, Wisconsin, Wyoming.

It will hardly be contended that the prohibition of the use of the national flag for advertising purposes is calculated to promote the health, comfort or safety of the general public. It is apparent, therefore, without discussion, that if this restriction or prohibition is within the police power of the state, then such power must be extended into a new field where it promotes patriotism by prohibiting such use of the flag.

Illinois and New York have held such prohibitive statutes unconstitutional. In *Ruhrstrat v. People of Illinois*,²¹ the Supreme Court in an able and exhaustive decision, holds that the police power does not extend this far, and that such a statute prohibiting the use of the national flag for advertising purposes is an interference with the constitutional privileges and immunities of citizens of the United States. This decision (1900) was without any direct precedent. The state contended that state enactments under the police power are supreme, unless there is a grant of exclusive authority to congress. It was further urged that the law being enacted under and by virtue of the police power of the state, the courts could not exercise a supervision over the wisdom and judgment of the legislature. These contentions, however, are manifestly unsound since the legislature does not have absolute power in the exercise of this police power. An act may be passed ostensibly in the promotion of public health, safety and morals, but it does not necessarily follow that such is always to be accepted as a legitimate and constitutional exercise of the police power. "Neither the legislature nor municipality can, under the guise of police regulations, arbitrarily invade private property or personal rights, and when such regulations are called in question, the test should be whether they have some relation to the public health or public safety and whether such is, in fact, the end sought to be attained."²²

(20) 33 Stat. at Large 724, sec. 5, chap. 592.

U. S. Comp. Stat. Supp., 1905, p. 670.

(21) 49 L. R. A. 180 (Ill.).

Regarding the scope and limitations of the police power the Illinois court²² holds as follows: "The police power is limited to enactments which have reference to the public health or comfort, the safety or welfare of society. Laws which impose penalties on persons, and interfere with the personal liberty of the citizen, cannot be constitutionally enacted, unless the public health, safety, comfort or welfare, demands their enactment. When the police power is exerted for the purpose of regulating a useful business or occupation, and the mode in which the business may be carried on or advertised, the legislature is not the exclusive judge as to what is a reasonable and just restraint upon the constitutional right of the citizen to pursue his calling. If, therefore, a statute, purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those subjects, or is a palpable invasion of right secured by the fundamental law, it is the duty of the courts to so adjudge and thereby give effect to the constitution."²⁴

It is apparent, therefore, that all enactments passed under and by virtue of the police power of the state are not on that account valid. If such enactments are passed under the guise of protecting the public safety, morals, or health, but in reality invade constitutional rights of the citizen, it is the duty of the courts to declare them invalid. The question now arises, do these various flag laws²⁵ tend to promote the safety, morals, health or comfort of society? If so, they fall under the police power and are valid; if not, they are unconstitutional. New York and Illinois have held such enactments invalid; the United States Supreme Court and Nebraska have held such enactments to be a proper and legitimate exercise of the police power.

(22) *Calif. Reduction Co. v. Sanitary Reduction Works*, *supra*.

(23) *Supra*.

(24) *Mugler v. Kansas*, 123 U. S. 623, *supra*.

(25) *Supra*.

The Illinois court²⁶ holds that the police power does not extend so far as to prohibit the use of the national flag for advertising purposes. Justice Magruder, in the course of the decision, says: "It is difficult to see how the flag law of 1899 tends in any way to promote the safety, welfare or comfort of society. The use of a likeness of the flag upon a label or as a part of the trademark of a business man in the lawful prosecution of his business cannot be regarded otherwise than as an act which is harmless in itself. It may violate the ideas which some people have of sentiment and taste, but the propriety of an act considered merely from the standpoint of sentiment and taste, is a matter about which men of equal honesty and patriotism may differ."

Again the court says: "It is not clear that the prohibition leveled against the use or display of the flag tends in any way to elevate the morals or promote the welfare of the public. It is difficult to see why, if in the prosecution of foreign commerce or trade, the flag is used to protect a ship and cargo, and designate its character, it should be a desecration of the same flag to use a likeness of it upon a label or trademark in the prosecution of domestic trade or business." In the opinion the Illinois court further holds, that since congress has passed no legislation restricting the use of the flag, or confining its use to only particular purposes, that such restriction does not exist and cannot be enforced by the state, especially so since it does not promote the health, safety or morals of the people. The court in support of its conclusion, advances a strong reason, as follows: "The use of the flag of the United States, as embodied in advertising sheets, placards and labels, has received the unqualified approval of the whole commercial world. The usage and practice of employing a flag for commercial purposes have been indulged in by citizens of the United States with the knowledge of the national government. The absence of congressional legislation against the usage and practice thus indulged in, has

(26) *Supra*.

created a "privilege" in the citizen of the United States to continue such use until withdrawn by competent authority. A state enactment depriving the citizen of such privilege, contravenes that clause of the amendment to the national constitution, which forbids any state to abridge the privileges and immunities of a citizen of the United States." The court in the able and exhaustive opinion, concludes that the flag act is unconstitutional, not only as infringing upon the personal liberty guaranteed to the citizen by both the federal and state constitutions, but also as depriving a citizen of the United States of a right of exercising a privilege impliedly, if not expressly, granted to him by the federal constitution.

The New York court of appeals²⁷ holds such a statute invalid on another ground, namely, that it attempts to destroy an existing property right. The court did not discuss the general scope of the police power and whether such power justified the Flag Act, but contented itself by holding the act invalid since it applied to articles legally manufactured and already in existence. Parker, Ch. J., in an exceedingly short opinion, says: "It is settled in this state that a statute which attempts to destroy an existing property right is void. This statute destroys existing property rights; the legislature is powerless to effectuate such a result."

The next and last case decided in any state involving the unconstitutionality of the Flag Act, arose in Nebraska. In this Nebraska case²⁸ a criminal information was brought for violating the Flag statute²⁹ by using a representation of the flag of the United States as an advertisement on a bottle of beer. The Nebraska Supreme Court upholds the validity of the enactment and in an exhaustive and well reasoned opinion concludes that the statute may be justified

in the exercise of the police power of the state. The conclusions and reasons of the court are interesting because they are diametrically opposed to the reasons advanced in the Illinois case.³⁰ In reply to the contention that where an act or course of action is not prohibited by the federal constitution, then the state cannot abridge such act, the court says: "If the fact that an act or course of action is not prohibited by the federal constitution gives a citizen of the United States a right which the state is powerless to abridge or restrict, the sphere of state legislation is more circumscribed than has been generally supposed, and our criminal code is largely waste paper. Nor can we agree that the federal government has the exclusive power to regulate the use of the national flag. It is not infrequent that the same act is an offense against both the state and federal governments. Counterfeiting furnishes an apt illustration. The power to punish for this offense is expressly given to congress, but the offense is also punishable under the laws of the federal states."³¹

Coming to the vital point, whether the police power justifies the Flag Act, the Nebraska court says: "The Illinois court held that the statute was not calculated to promote the health, comfort, safety and welfare of society. We find ourselves unable to agree with a court to whose opinions, ordinarily, we attach great weight. Patriotism has ever been regarded as the highest civic virtue and whatever tends to foster that virtue certainly makes for the common good. The flag is the emblem of national authority. To the citizen it is an object of patriotic adoration, emblematic of all for which his country stands—her institutions, her achievements, her long roster of heroic dead, the story of her past, the promise of her future; and it is not fitting that it should become associated in his mind with

(27) *People ex rel. Pike v. Van De Carr*, 178 N. Y. 425, 66 L. R. A. 189.

(28) *Halter v. State*, 105 N. W. Rep. 298.

(29) *Supra*.

(30) *Supra*.

(31) *Fox v. State*, 5 How. (U. S.) 416, 12 L. Ed. 213.

anything less exalted, nor that it should be put to any mean or ignoble use."

In the opinion the court offers what seems to be an ingenious and, to my mind, far fetched reason, when it says: "Moreover, that the citizen resents any improper use of the flag of his country, and that his resentment is frequently carried to the extent of a breach of the peace, are matters of common knowledge. The state has the undoubted right to legislate in the interest of the public peace. The act in question, is therefore justified as a valid exercise of the police power of the state." This certainly is questionable logic and is drawing a conclusion from rather doubtful premises.

In criticising the decision of the New York court³² where the flag statute is held unconstitutional, because it interferes with existing property rights, the Nebraska court says: "By sweeping prohibitory legislation, those engaged in the manufacture and sale of intoxicating liquors were put out of business in the state of Kansas and property was rendered practically valueless. The United States Supreme Court³³ upheld the validity of such legislation."

The Nebraska court, therefore, holds that the police power may prohibit the use of the national flag for advertising purposes.

Whether or not the flag legislation may be justified under the exercise of the police power seems to have been finally settled by a recent decision of the Supreme Court of the United States.³⁴ The decision of the Nebraska court³⁵ is affirmed, with Mr. Justice Peckham dissenting. Mr. Justice Harlan, in upholding the constitutionality of the Nebraska flag enactment, says: "The importance of the questions of constitutional law raised will be recognized when it is remembered that more than half of the

states of the union have enacted statutes³⁶ similar, in the general scope, to the Nebraska statute. That fact is one of such significance as to require us to pause before reaching the conclusion that a majority of the states have, in their legislation, violated the constitution of the United States." In commenting upon the general powers of the state to legislate, as to the limitations of such legislation, Justice Harlan says: "Except as restrained by its own fundamental law, or by the supreme law of the land, a state possesses all legislative power consistent with a republican form of government; therefore each state, when not thus restrained, and as far as this court is concerned, may, by legislation, provide not only for the health, morals and safety of its people, but for the common good, as involved in the well being, peace, happiness and prosperity of the people. Guided by these principles, it would seem difficult to hold that the statute of Nebraska, in forbidding the use of the flag of the United States for purposes of mere advertising, infringes any right protected by the constitution of the United States, or that it relates to a subject exclusively committed to the national government." In the course of the opinion, Mr. Justice Harlan traces the origin and history of the flag, and then says, relative to the regulation of its use as coming under the police power of the state: "Every American has an appreciation and a deep affection for the flag. Love, both of the common country and of the state, will diminish in proportion as respect for the flag is weakened. Therefore, a state will be wanting in care for the well-being of its people if it ignores the fact that they regard the flag as a symbol of their country's power and prestige, and will be impatient if any open respect is shown towards it. The use of the flag for purposes of trade and traffic, tend to degrade and cheapen it in the estimation of the people, as well as to defeat the object of maintaining it as an emblem of national power and national honor. And we cannot hold that any privilege of American citizenship, or that any right of personal

(32) *Supra*.

(33) *Supra*.

(34) *Halter v. Nebraska* (March, 1907), *Adv. Sheets Sup. Ct. Rep.*, Vol. 27, No. 9, p. 419.

(35) *Supra*.

(36) *Supra*.

liberty is violated by a state enactment forbidding the flag to be used as an advertisement on a bottle of beer."

Further in the opinion the court holds that the legislature knew that the flag is the symbol of the nation's power. "It is not extravagant to say that to all lovers of the country it signifies government resting on the consent of the governed; liberty regulated by law; the protection of the weak against the strong; security against the exercise of arbitrary power; and absolute safety for free institutions against foreign aggression." The court then holds the statute valid, inasmuch as it was intended to cultivate a feeling of patriotism. Mr. Justice Harlan in this connection says: "It may reasonably be affirmed that a duty rests upon each state in every legal way to encourage its people to love the union, with which the state is indissolubly connected." In concluding the opinion, the court holds "It would be going very far to say that the statute in question had no reasonable connection with the common good and was not promotive of the peace, order and well being of the people. Before this court can hold the statute void it must say that, and in addition, adjudge that it violates rights secured by the constitution of the United States. We cannot so say and cannot so adjudge. We hold that the provision against the use of the flag for advertising articles of merchandise is not repugnant to the constitution of the United States."

This recent decision of the Supreme Court of the United States would, therefore, seem to give finality to this novel and interesting question.

Recapitulating, it may be observed, first, that the courts generally hold that enactments to promote the health, morals and safety of the public are valid as proper exercise of the police power of the state.

Second. Neither the legislature nor the municipality can, under the guise of police regulations, arbitrarily invade private property or personal rights.

Third. A state may, in the exercise of

the police power, prohibit the use of the national flag for advertising purposes, such regulations being justified as promotive of the peace, order and well being of society.

GEO. A. LEE,

Spokane, Wash.

INSURANCE—RISKS—CHANGE OF LOCATION.

LATHERS v. MUTUAL FIRE INS. CO. OF TOWN OF LA PRAIRIE AND ADJOINING TOWNS.

Supreme Court of Wisconsin, April 17, 1908.

A policy of insurance covered a farm barn and live stock customarily kept therein against loss by fire; the live stock being described as "therein on the farm and from lightning at large." A horse that was on the farm at the time the policy was executed was subsequently taken temporarily to another farm, in which plaintiff had no interest, and while there was destroyed by fire. Held, that the policy covered the horse on the farm to which he was removed.

Where parties to a contract use language, the construction of which is well settled by law, they must be presumed to have used the language understandingly in the sense established by the construction given it by law.

Action to recover on an insurance policy.

The issues were tried by the court without a jury and, omitting formal matters, were thus in substance closed as to facts: September 15, 1904, defendant duly made and delivered to plaintiff an insurance policy covering the risk of loss by fire or lightning of the former's live stock, including a horse, the value of which it is sought to recover. The language of the policy as to the location of the live stock was in these words: "Live stock therein, on the farm and from lightning at large * * * all situated in the town of Turtle, county of Rock and State of Wisconsin on section 16." The horse was plaintiff's property from and before the time the insurance policy was issued till it was destroyed by fire and did not become encumbered after the application for insurance. He complied with all conditions of the insurance contract, and it was in force at the time of the loss. When the insurance was applied for and the policy was issued the horse was on plaintiff's farm in said section 16. June 20, 1906, the horse was destroyed by fire. At the time thereof it was on a farm some seven miles from plaintiff's farm. The fire did not occur from any of the risks ex-

cepted from those insured against. The horse was temporarily placed at the farm where it was destroyed to be broken, as was customary. At the time the policy was issued plaintiff was the owner of a large number of horses which he kept at his farm. That fact was well known to the president of the insurance company. In the section of the country where such farm was located, defendant transacted business and its officers resided there was a well established custom of placing young horses out to be broken. The horse was so placed for about three months, which was a reasonable time to accomplish the object thereof. Plaintiff had no interest in the farm where the horse was destroyed. The value of the horse at the time of the fire was \$75. The loss was also insured against by another insurance company, the defendant having due notice thereof and consenting thereto. By reason thereof defendant is liable for one-half the value of the horse. Due notice of the loss, in compliance with the conditions of the policy, was given to the defendant.

The conclusions of law were to this effect: There was no warranty that the live stock should be kept on plaintiff's farm, nor was loss of the same while off the farm absolutely excepted from the risks insured against. The legal effect of the language of the policy is that the usual location of the live stock should be on the farm and that in case of a loss thereof by fire or lightning while temporarily and in the ordinary customary course of things absent therefrom it should be regarded as within the risks insured against. Plaintiff is entitled to recover one-half the value of the horse, to-wit: \$37.50, with interest and costs. Judgment was rendered accordingly. Defendant appealed.

MARSHALL, J. (after stating the facts as above): Under the rules governing the subject, it is the opinion of the court, that no legitimate ground exists for disturbing the decision of the trial court in this case on the controverted matters of fact.

There is left to be determined this question of law: In case of insurance of a farm barn and of live stock customarily kept therein when not in use against loss by fire, the live stock being described as "therein on the farm and from lightning at large," is risk of loss of the stock by fire while, temporarily and according to custom, off the farm, included in the contract, there being no negative thereof expressly or by necessary inference, other than suggested by the words "therein, on the farm," etc.? The proposition is ruled in the affirmative, as respondent's counsel contend and the

trial court decided, by *Noyes v. Northwestern National Insurance Co.*, 64 Wis. 415, 25 N. W. Rep. 419, 54 Am. Rep. 631.

In the case referred to this court, while recognizing the existence of some conflict in the authorities, adopted the doctrine sustained, as it was thought, by the great weight of authority, that such language in a policy of insurance as that under consideration, unrestrained by other language, with reference to personal property which in the ordinary course of things is not kept constantly in a particular location should be held to have been used as merely descriptive of the subject of the insurance and its customary location, the dominant idea being insurance against risk of loss from specified causes; that such dominant idea should be regarded as having been intended to extend beyond the customary location of the property so as to include the ordinary incidental changes common thereto. The court referred to many cases involving insurance of live stock on farms and there are many others subsequently decided. *Peterson v. Mississippi Valley Ins. Co.*, 24 Iowa, 494, 95 Am. Dec. 748; *Mills v. Farmers' Ins. Co.*, 37 Iowa, 400; *McCluer v. Girard Fire & Marine Ins. Co.*, 43 Iowa, 349, 22 Am. Rep. 249; *Trade Insurance Co. v. Barracliff*, 45 N. J. Law, 543, 46 Am. Rep. 792; *Holbrook v. St. Paul Fire & Marine Ins. Co.*, 25 Minn. 229; *American Central Insurance Co. v. Haws (Pa.)*, 11 Atl. Rep. 107; *Haws v. Fire Association of Philadelphia*, 114 Pa. Rep. 431, 7 Atl. Rep. 159.

The rule involved is one of construction. The idea is that the dominant purpose of the insurance being protection against loss from specified causes it could not be effectuated if the language of the policy restricted liability to loss occurring while the subject of the insurance remained in its customary location when not in use, incidental changes, as matter of common knowledge, being necessary to the enjoyment of the property in the ordinary way. So, under familiar rules, the absurd result that would happen in case of a strict construction or of treating the language as descriptive of the particular location of the property at the time of the happening of the loss is avoided by a free and liberal construction, the language being regarded as descriptive only of the subject of the insurance and of the general location thereof. In that way only, it is thought, could the mutual intention of the parties be effected. Obviously, as the fact is, the rule of construction applies only to such kinds of property as in the very nature of things does not and cannot without rendering the same substantially useless have a permanent location as in a particular building

or in a building at all. The rule is particularly applicable to horses because of the fact that use thereof for any purpose is commonly outside of a barn and because, on a farm, even when not in use they are commonly turned out to pasture.

The extent to which the rule under discussion has been carried in some jurisdictions goes much farther than is required for the purposes of this case, and perhaps than could be reasonably sustained. We refer to two illustrations, not at this time with approval, but to show how broadly the rule has been applied.

In *American Central Ins. Co. v. Haws*, supra, the language of the policy after the description of the property insured was this: "All contained in his new two-story frame barn, situated," etc. It was held to cover loss of a horse which was killed while at large in a pasture adjoining the barn, notwithstanding this language: "This policy shall be void and of no effect if the property be removed to any other building or location than that described therein."

In *Machine Co. v. Insurance Co.*, 173 Pa. 53, 34 Atl. Rep. 16, patterns were insured against loss by fire. They were described as in the pattern shop. The undertaking was to insure the patterns "while located and contained as described herein, and not elsewhere," etc. The property was destroyed by fire while in use temporarily in a building near the pattern shop, which building was part of the manufacturing plant covered by the insurance. The pattern shop was not injured and had the patterns remained located therein the loss thereof would not have occurred. It was held that the policy covered the loss.

The law as above indicated and applicable to this case had been well settled in this state for more than twenty years before the insurance contract before us was made. Hence, if, as an original proposition, there could be any serious doubt as to its proper construction there cannot be under the circumstances. The parties must be presumed to have, understandingly, used the language they did in the broad sense which the established rule of construction suggests. Had it been desired to escape the effect of such rule, words might readily have been adopted to effect such desire. As the case stands the judgment is right and must be affirmed.

Judgment affirmed.

Note.—Change of Location of Thing Insured.—The words pointing out the present location of the thing insured are in law treated as descriptive unless the contract of insurance clearly and unequivocally provides otherwise. In this

respect the rule is somewhat similar to the rule of construction in life insurance. The policy may insure the life of A. B. of Boston. The words "of Boston" would be merely descriptive of the person insured. Even though A. B. met his death in the heart of Africa, the insurer would be liable, unless the contract contained a clear, distinct and unequivocal limitation rendering the policy void under the extra hazards of African adventure.

In *Peterson v. Mississippi Valley Ins. Co.*, 24 Iowa, 494, certain property was insured, among which were seven horses, situated in section 22. The assured, a farmer, while hauling his grain to market with two of the horses, put up for the night at a hotel, some distance away from section 22. During the night the barn in which the horses had been placed was destroyed by fire, and one of the insured horses burned to death. In that case the company was held liable, the risk being said to extend to the usual and ordinary use of the horses not only on section 22, but elsewhere.

In *McCluer v. Girard F. & M. Ins. Co.*, 43 Iowa, 349, the policy covered a phaeton "contained in a frame barn," and while at a carriage shop undergoing repairs it was destroyed. The company held liable.

In *Everett v. Continental Insurance Co.*, 21 Minn. 76, a threshing machine "stored in barn," etc., was insured. It was burned while standing in the field. In that decision it is said: "But whatever might have been the purpose of the location of the machine in the application and policy, there is no ground whatever for contending that it was, in letter or in spirit, a promissory stipulation on the part of the insured, or a condition of insurance on the part of the insurer, that this location should remain unchanged, or if changed, that while changed the insurance should cease or be suspended."

The doctrine of the principal case is thus well supported by authority, and is founded on one of the elements of contract, viz., intention of the parties.

JETSAM AND FLOTSAM.

VIRGINIA TITLES IN EASTERN KENTUCKY.

In the case of the *Eastern Kentucky Coal Lands Corporation v. Commonwealth* (Reported in 106 S. W. Rep. 260, January 22, 1908), wherein it was sought, by the above named corporation to assess, for taxation, 275,000 acres located in Pike county, Kentucky, under an Act of the Kentucky legislature passed in December, 1906, requiring all claimants of lands, to assess such lands by the first day of January, 1907, and to file a petition in the county court for leave to assess by the first day of March, 1907, the court, although no such question was before it, by any pleading in the case, held the law to be constitutional and valid, and in the next place, held the petition to assess insufficient, under this law because it failed to properly describe the land sought to be assessed. Under this decision, by the ordinary rule of pleading and practice, the presumption is, that if the pleader should go into the Pike County Circuit Court, and ask leave to file an amended petition, and should file a petition, containing a sufficient description of the land sought to be assessed, that this new filing would date back to the date of filing the original petition, and if

the petition was sufficient, there would be presented to the commonwealth, an issue for it to combat in such manner as it saw fit, consistent with its rights under the law.

In the history of legislation and judicial decisions, bearing upon this question of land titles in eastern Kentucky, it is admitted by the court that the titles granted by Virginia, to various parties, within the boundaries of Kentucky, prior to the time the latter became a state, were valid and gave such grantees title to the land, and it is also admitted, that such titles have never been affected, by any legislation Kentucky has enacted, and that matters stand just as they did when these two states entered into the Compact by which Kentucky became a state, except insofar as these Virginia grantees have lost title to portions of their land, by parties entering upon them, and occupying them within the terms of the Kentucky statutes of limitations. The inevitable conclusion is that such land as originally vested in the Virginia patentees by the Virginia patents and has not been so adversely occupied still remains in those Virginia patentees. So, to quite an extent, this decision does clear up the atmosphere, in regard to the titles to these lands. The Virginia patentees, are informed what land they own, and what they do not own, and this can be ascertained, by a survey of the entire original Virginia survey; and then surveying the holdings inside of it that have been occupied adversely for fifteen years, and subtract this from the amount of the original survey, and whatever is left, if any, belongs to the Virginia patentee. This may be expensive, but the court says that is no excuse and cannot be accepted. The petitioner to assess did not claim to be the owner of any of the improvements on any of the land sought to be assessed nor so much of the surface as had been adversely held for a period sufficient to toll petitioners right of entry. The petition averred that the petitioner was an owner, but of what part of an entire survey or in what proportion, and by whom the residue of the survey was owned, did not appear. The court said the land was not so described that it could be identified, and that it must be so described. The petitioner set out the entire survey as the land in which he held an interest, and left the court to find out where it was, in the survey.

The holding of the court is certainly based on the decisions. In *Cooley on Taxation* it is said, "The description in a deed must be one that identifies the land with reasonable certainty." *Gooch v. Bengel*, 90 Ky. 393, 14 S. W. Rep. 375. In *Tucker v. Carlson*, 113 Iowa, 449, the court said, "a description in a tax deed of the northwest twenty-eight acres of the southwest fourth of the southwest fourth, is not a sufficient description of a tract comprising all of such forty acres; except a square acre in the northeast corner and an irregular tract in the southeast corner." In *Roberts v. Deed*, 57 Iowa, 320, the description was the "northwest part of the northeast fourth of the northeast fourth of Section 31, Township 74 east, range 8 west, containing three acres. The court said the description does not indicate the figure of the land. In *Ferguson v. Huffman*, 33 Ohio St. 395, a tax deed for 100 acres of 600 acres was held void. In *Underhill v. Kiers*, 54 N. Y., App. Division, 214, the description "twenty-five acres out of a tract of 101 acres, on the north side and fronting on a highway, was held to convey no title. In *Wales v. Spofford*, 58 Texas, 115, the description was "One league and labor of land patented

to P. Tesla, and known as Survey No. 412, situated in Kaufman county, Texas, about four miles northeast of the town of Kaufman, less the sum of 588 acres claimed by Thomas A. Byrum, and 1,531 acres claimed by Leon and H. Blum, out of said survey. It was held to convey no title.

The opinion of the court sustaining the demurrer to the petition to assess lands for taxation, on the ground of insufficient description of the land sought to be assessed, as stated in the opinion of the court, in its conclusion, was doubtless sound, and that question was before the court, by the demurrer to the petition, and that was the only question before the court. The filing of the petition admitted the constitutionality of the act of 1906, so far as the petitioner was concerned, and the commonwealth was interested in maintaining its constitutionality, and how, under any system of practice, the constitutionality of the act of 1906, could arise in the case, and the court hear argument, and render a long and exhaustive opinion on the constitutionality of law whose constitutionality was not questioned by any pleading in the case, was certainly an anomaly in practice. Issues are made up by pleadings in a case, and pleadings are filed for that purpose, and when a court goes outside of these issues and declares itself upon questions not properly before it such declarations of the court are not usually accepted as authority in other courts. They are treated as obiter, and as not decisive of anything that was not actually before the court, and as a rule, attorneys do not refer to them as authority. The most that can be made of such judicial utterances is, that what a court has said under such circumstances would probably be its opinion, if the question discussed was actually before the court. But the same court may not be there when the question does arise, and men of a different frame of mind may constitute the court, and for that reason only the decision of the question before the court has force with other courts.

The fact that during all the years the title to these lands has been in the Virginia patentees they have never contributed anything to the public revenue, save the small pittance they originally paid for their titles, while those who have occupied the lands, built their homes upon them, and otherwise improved them, presents a pathetic case for the moralist, only partially informed as to the facts, but the actual facts would seem to disclose two sides to the moral question in the case. In 1801 the legislature of Kentucky passed a law which was intended to forfeit all these titles to the state which were not listed for taxation by the first day of October, 1801. No doubt, many Virginia patentees believed this law was effective, and Kentucky strengthened this belief by granting Kentucky patents to lands that had not been properly listed. The law was declared unconstitutional in 1815 (*Barbor v. Nelson*, 1 Littell 60, and *Robinson v. Huff*, 3 Litt. 385). The law was amended in 1825 by simply inserting the words, "without inquest of office found," and this amended law was declared unconstitutional in 1876 (*Marshall v. McDaniel*, 75 Ky. 365). Kentucky lowered the price of the land per acre in 1825 to ten cents per acre, to five cents in 1835, and two and one-half cents per acre in 1844 in 32 counties named in the act. Act of 1844. This fact must impress one that the Kentucky patentees were not large contributors to the public revenues, in the prices they originally paid for these lands. In

this respect they were perhaps on an equality with the Virginia patentees. The sliding scale of prices, from twenty cents per acre down to two and one-half cents per acre, which Kentucky adopted in the sale of these lands to the settlers, would indicate that the state had little faith in the title she was giving her grantees, and the constant reduction in the price appears to indicate her diminishing faith. It amounted to saying to these grantees, "we do not know what we are giving you, but we will give you what we seem to have at what it costs to make out the papers, and you can take your chances." They took such title as the state had to give, which the court now admits was a mere nullity, and for them the court now sounds the cry of hardship in being robbed of their homes, when the court itself admits that the foundation of the home she furnished these people was all sand.

The court, in its dissertation, gives us to understand the law passed in 1906 is an heroic attempt, on the part of the Kentucky legislature, to get rid of these Virginia grants, and do now, what everyone else sees, she ought to have done more than a hundred years ago, instead of permitting a matter of such grave import to run on as it has been running, until such vast interests have become involved. It is not an exalted judicial view the court takes in laying all the fault of this situation upon the Virginia patentees, when the clear inference from the court's own statement is that Kentucky might have changed this entire situation a hundred years ago just as well as now. The disinterested public will place the blame where it belongs, whether the court does or not.

It is history, and it is referred to in the recent opinion of the court of appeals, that there was hostility among the people residing in the district of Kentucky, to these Virginia titles, before Kentucky became a state, and the compact between Virginia and the proposed new state was demanded by Virginia for their protection, by reason of that hostility. And the early legislation of Kentucky affords ample evidence of the continuance and growth of this hostility on the part of Kentucky as a state, and it is not remarkable that this hostility was communicated to the people directly affected by this title question. It is also local history, within the memory of many yet living, that it has seldom been safe, from the early beginning of the state, for one of these Virginia title-holders to go into any of the eastern counties and assert title under one of these Virginia patents. At the first hearing of an application to assess these titles for taxation, at Prestonsburg, in March, 1907, by the assignees of a large body of these lands, the public prints made the statement in all seriousness that one attorney representing settlers on these lands in Floyd county, advised his clients to come to the county seat, bring their Winchester and stack them around the court house during the hearing of the case. And it was common remark that it was a brave and risky act for attorneys to come into that community and assert in the courts such a claim as they were making. Records of the federal court at Frankfort show that as far back as 1840 federal deputy marshals were shot at in eastern Kentucky from the brush while attempting to serve process in suits instituted by the late ex-Governor Robert Wickliffe, involving the Virginia title to some of these lands.

The conditions of these titles have all along been well known to many lawyers, and from

time to time feeble attempts to assert title under these Virginia patents have been made in the federal courts. These suits have seldom reached farther than the first order of the court. These attempts were usually a suit in ejectment against all the parties occupying lands within a designated boundary or survey, and the first order of the court has been for the claimant in ejectment to bring in a survey of the land, including the smaller surveys claimed by settlers within the principal boundary. And it was generally a part of the order that if the surveyor was interfered with the fact should be reported to the court. Surveyors are still living who twenty years ago, when attempting to make a survey on Tug Fork of Big Sandy, under an order of the federal court at Louisville, were stoned by young boys when they would venture out of their quarters after dark. Many such instances as this could be enumerated, and they all detract from the weight of Judge O'Rear's moral discourse, which forms a large part of the judicial effusion, in the case now under consideration. To the average man life has been preferable to land, and although he might have a good claim to land under a Virginia title in eastern Kentucky, yet if it was likely to cost him his life to assert it, or he believed it would, he stayed away from Kentucky. Her "Night Riders" of the present day are merely another form of disregard for law that has prevailed in regard to these Virginia titles for more than one hundred years.

The learned judge, in his opinion, says 300,000 people are living within the district affected by these Virginia titles, and they are all interested in the settlement of this question. No doubt this is true, but this title question was there before any of the 300,000 were there, and if any of them were there as early as 1818, which is doubtful, they were then informed by a decision of the Kentucky court of appeals (*Barbour v. Nelson*, 1 *Littell*, 60), that this Virginia title question was still there, and had not been settled by anything the legislature or courts of Kentucky had done. The people affected by this title question were placed upon notice by the records of land offices, deed books and decisions of the courts, what the situation was in regard to these titles, and there was doubtless any amount of legal talent available to advise them as to their rights, and the risks they were taking. And so far as the Virginia title holders were concerned, in failing to assert their claims, it was not an ordinary case of "standing by," as understood in law, but, as we see on the facts hereinbefore stated, it was rather a case of "you Virginia claimants keep hands off, or mix in at your peril," and the moral of this land story is stripped of much of its pathos when the facts are sifted down and the truth brought to light. It is the case of one man owning the farm and another using and wearing it out, and the latter complaining of the former because he has not improved and paid taxes, when to attempt either meant violence, or worse.

Indianapolis.

JOHN LAW.

THE CRIME OF PERJURY.

That the crime of perjury is much in evidence, and apparently on the increase, has been asserted and is probably correct. Articles many have been written on the subject in legal journals, calling attention to the evil. The bench declaims against it, but nothing is done. Suggestions are not wanting. One is, that if lawyers would discountenance false swearing on

the part of their own clients and ask for judicial protection when committed by their adversaries, the crime would at once grow less. Others say that justice should be meted out to false witnesses by summary action on the part of the presiding judge, one writer saying, "the perjurer would no more dare to come forward in our courts than in the English courts, if he knew that our trial judges were in the habit of committing perjurers on the spot, nor would any lawyer produce an obvious perjurer if he knew that to do so would mean his disbarment." He continues by saying that "the chief responsibility for perjury in the courts is with the trial judges themselves, because they have the power to stop it, and do not."

It is much easier to dilate upon an evil than to suggest a remedy, for the difficulties attendant upon this question are many, and need not at present be enlarged upon. Must it be left to the advancement of civilization and the supposed growing morality of the world in the future as to which it clearly must stand till the millenium; or are the judges to take a hand in running the risk of doing an occasional act of injustice for the benefit of the community? The law is clear enough, the application of it is the difficulty.

KANSAS WOMAN PROBATE JUDGE.

Governor Hoch has settled the Mitchell county probate fight by appointing Mrs. Levi Cooper to the job.

Mrs. Cooper is the widow of the late probate judge, who died about a week ago. During her husband's life she was deputy probate judge, and thoroughly understands the work of the office. When Mr. Cooper died, P. G. Chubbic and Cyrus Gaston applied for the place, and each one agreed to leave Mrs. Cooper in as judge pro tem.

"I got to thinking the matter over," said Governor Hoch, "and decided that if Mrs. Cooper was so valuable in the office there was no reason why she should not be appointed herself. So I have just decided to appoint her and settle the contest that way. So far as I know Mrs. Cooper is the first and only woman probate judge in the state."—Topeka State Journal.

BOOK REVIEWS.

AMERICAN DIGEST, ANNOTATED. 1907A.

This volume, as announced by the publishers, is, in reality, the beginning of a new series. It supplements the Decennial Digest, just as the Decennial supplements the Century. As will be remembered, the Century Digest covers all American case law, from the earliest time down to 1896. The Decennial Digest covers American case law from 1897 to 1900, and the present volume brings the series complete down to date of publication. The present series of which this volume is one, will be supplemented by monthly advance sheets, it being the desire of the publishers, to keep the profession in touch with the latest decisions of the courts. The titles and subdivisions are uniform with the titles and subdivisions of the earlier volumes. An improvement in the present volume is the insertion at the head of each topic of a full analysis of the topic. Published by West Pub. Co., St. Paul, Minn.

HUMOR OF THE LAW.

The lawyer of the defendant was trying to cross-examine a Swede who had been subpoenaed by the other side as a witness in an accident case.

"Now, Anderson, what do you do?" asked the lawyer.

"Sank you, Aw am not vera well."

"I didn't ask you how is your health, but what do you do?"

"Oh, yes; Aw work."

"We knew that, but what kind of work do you do?"

"Puddy hard work; it ees purty hard work."

"Yes, but do you drive a team or do you work on a railroad, or do you handle a machine, or do you work in a factory?"

"Oh, yas; Aw work in fact'ry."

"Very good. What kind of a factory?"

"It ees a very big factory."

"Your honor," said the lawyer, addressing the court, "if this keeps on, I think we'll have to have an interpreter."

Then he turned to the witness:

"Look here, Anderson, what do you do in that factory—what do you make?" he asked.

"Oh, yes; Aw un'erstan'; you want to know vat Aw make'n fact'ry, eh?"

"Exactly. Now tell us what you make?"

"Von dollar an' a half a day."

And the interpreter was called in.—Philadelphia Ledger.

SAD TALE OF A MOTORIST.

There was a man of modest means,

But inclinations gay,

Who sold a corner lot and bought

A motor car one day.

He closed his business up to ride

Within the big machine,

And parted with his diamond ring

To buy the gasoline.

Before, along the country roads,

The sumac lit its fires,

He put a mortgage on his house

To purchase rubber tires;

And next he auctioned off his beds,

His tables and his chairs

To give the car a coat of paint

And make some slight repairs.

But speeding in the early dusk,

Without his lamps alight,

A man in blue and brass appeared

And stopped his dizzy flight.

He didn't have a single cent

To pay the fine imposed;

They took the auto for the debt,

And so the tale was closed.

—Popular Mechanics.

An Ohio lawyer tells of a client of his—a German farmer, a hard-working, plain, blunt man who lost his wife not long ago. The lawyer had sought him out to express his sympathy; but to his consternation the Teuton laconically observed:

"But I am again married."

"You don't tell me!" exclaimed the legal light. "Why, it has been but a week or two since you buried your wife!"

"Dot's so, my fren't; but she is as dead as effer she vill be."—Lippincott's.

WEEKLY DIGEST.

Weekly Digest of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of all the Federal Courts.

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1. **Abstracts of Title—Effect of Publication.**—A compiler from public records and other sources of an abstract of title to lands held entitled to the exclusive use of the abstract until published.—*Vernon Abstract Co. v. Waggoner Title Co., Tex.*, 107 S. W. Rep. 919.

2. **Acknowledgment—Defective Acknowledgment.**—An acknowledgment of a contract of sale of land, though defective, held not to render the contract invalid, since no acknowledgment is required on the execution of such a contract.—*Campbell v. Hough, N. J.*, 68 Atl. Rep. 759.

3. **Married Women.**—Acknowledgment of a deed by a married woman held not objectionable for failure to show that the deed was explained to her, or that she acknowledged it to the officer.—*Best v. Kirkendall, Tex.*, 107 S. W. Rep. 932.

4. **Adjoining Landowners—Lateral Support.**—An owner making an excavation on his own land is not liable for injury to the adjacent land unless the excavation is negligently done, and if it is done with proper care, the owner of the adjacent land must protect the same from damage.—*Gates v. Fulkerson, Mo.*, 107 S. W. Rep. 1032.

5. **Adverse Possession—River as Boundary.**—Where it is the custom to use a river as a barrier on the side of inclosures, a tract of land is sufficiently inclosed to give notice of an adverse holding if it is fenced on all sides except along such river.—*Dunn v. Taylor, Tex.*, 107 S. W. Rep. 952.

6. **Animals—Vicious Cow.**—In an action against a corporation and its manager for injuries caused by a vicious cow, held that plaintiff's pleading alleging the ownership of the animal in the corporation, they could not change their position on the trial so as to show ownership in somebody else.—*Stevens v. Mrs. E. D. Burgulieres Planting Co., La.*, 45 So. Rep. 601.

7. **Appeal and Error—Appellate Jurisdiction.**—On appeal to the county court by defendants,

where the record does not show that an appeal bond or an affidavit was executed as required, the county court not having jurisdiction, a subsequent appeal from the county court does not give the court of civil appeals jurisdiction.—*Maley v. Mundy, Tex.*, 107 S. W. Rep. 905.

8. **Harmless Error.**—A misstatement in the charge as to a wholly unimportant fact is not ground for reversal, especially where the attention of the court was not called to the same when made.—*Pennsylvania R. Co. v. Donora Southern R. Co., Pa.*, 68 Atl. Rep. 845.

9. **Legal Issues in Equity Action.**—Where a legal issue in an equity suit was tried to a jury, and the verdict was sustained both by the law judge and the chancellor, it would not be set aside on appeal, unless substantial error to the prejudice of the defeated party was committed in the trial thereof.—*Modawick v. Martineck's Guardian, Ky.*, 107 S. W. Rep. 759.

10. **Rulings on Demurrer.**—The supreme court cannot consider demurrers where the record does not disclose any action by the court thereon.—*Reeves v. Anniston Knitting Mills, Ala.*, 45 So. Rep. 702.

11. **Rulings on Pleading.**—The sustaining of a demurrer to paragraphs of the answer was without prejudice where such paragraphs professed to answer paragraphs of the complaint eliminated by demurrer.—*Polk v. State, Ala.*, 45 So. Rep. 652.

12. **Sufficiency of Evidence.**—Where an issue was submitted without any question by plaintiffs, whether there was any evidence to support it, the object was thereby waived, and was not transferred on appeal by a general exception to defendant's verdict.—*Tilton v. Tilton, N. H.*, 68 Atl. Rep. 867.

13. **Appearance—Appearance after Decree.**—A petition by a defendant against whom a decree for divorce had been granted attacking the validity of the decree for lack of jurisdiction, and praying for the vacation thereof and for other relief, held not a general appearance sufficient to confer jurisdiction on the court.—*McGuinness v. McGuinness, N. J.*, 68 Atl. Rep. 768.

14. **Assault and Battery—Criminal Liability.**—In a prosecution for assault, where a count charged an assault with a weapon, to wit, a gun or pistol, a charge which failed to state the character of the assault necessary to be proved under such count was erroneous.—*Crenshaw v. State, Ala.*, 45 So. Rep. 631.

15. **Pleadings.**—In an action for an assault and battery, where self-defense is set up, the burden of showing freedom from fault on the part of defendant in bringing on the difficulty is not on defendant.—*Morris v. McClellan, Ala.*, 45 So. Rep. 641.

16. **Assumpsit, Action of—Recovery on Common Counts.**—To authorize the transferee of nontransferable checks issued by an employer to recover under the common counts, it must be shown that he bought the checks at the instance or request of the employer.—*Kanjutsky v. Tennessee Coal, Iron & R. Co., Ala.*, 45 So. Rep. 676.

17. **Bankruptcy—Composition.**—Bankr. Act c. 541, sec. 12d, requires the judge to be satisfied that a composition is for the best interest of the creditors before confirming it, but its acceptance by a majority of them is prima facie evidence of such fact, and the burden rests upon objecting creditors to show a gross discrepancy between the amount offered and the amount to be reasonably expected from a sale

of the assets to justify a refusal to confirm.—*In re Waynesboro Drug Co.*, U. S. D. C., S. D. Ga., 157 Fed. Rep. 101.

18.—**Conflicting Jurisdiction.**—An attempt by the assignee of a dividend in a bankruptcy court to invoke the trustee process of a state court is an interference with the exercise of a paramount federal authority and an obstruction of the administration of the bankrupt estate.—*Rockland Sav. Bank v. Alden*, Maine, 68 Atl. Rep. 863.

19.—**Petition to Reclaim Property.**—A petition to a court of bankruptcy to reclaim property which was in the bankrupt's possession, but which the petitioner claims to own, need not describe the property with the degree of definiteness and particularity required in a complaint in replevin.—*In re Pierce*, U. S. C. C. of App., Eighth Circuit, 157 Fed. Rep. 757.

20. **Banks and Banking—Insolvency.**—Where a large part of the assets of an insolvent banking corporation consists of obligations of subsidiary companies and firms formed by its officers and largely financed by it, an officer and director who, although not an active participant of such transactions, was cognizant of and consented to them, should not be appointed or continued as its receiver.—*Coy v. Title Guarantee & Trust Co.*, U. S. C. C., D. Oreg., 157 Fed. Rep. 794.

21. **Benefit Societies—Recovery of Money Paid.**—One held not entitled to recover money paid as money had and received notwithstanding a mistake of law, the consideration being indivisible and there not having been a total failure of consideration.—*Southern Mut. Aid Ass'n v. Watson*, Ala., 45 So. Rep. 649.

22. **Bills and Notes—Bona Fide Purchasers.**—Where a corporation issues commercial paper when not authorized to issue any commercial paper, such paper is void even in the hands of a bona fide purchaser for value before maturity.—*Stouffer v. Smith-Davis Hardware Co.*, Ala., 45 So. Rep. 621.

23. **Brokers—Commissions.**—A real estate agent, whose authority to sell is first put in writing in a contract for sale between the vendor and vendee, which is not under seal, cannot recover commissions.—*Alpern v. Klein*, N. J., 68 Atl. Rep. 799.

24.—**Commissions.**—That a partner of the purchaser produced by a real estate agent attempted to buy direct of the owner, who refused to sell, should not deprive the agent of his commission where he had no knowledge thereof, and acted in good faith.—*Hartford v. McGillicuddy*, Me., 68 Atl. Rep. 860.

25. **Carriers—Change in Nature of Liability.**—After a consignment is ready for delivery, the custody of the common carrier will not cease and become that of a warehouseman, until the lapse of a reasonable time in which to accept the shipment.—*Central of Georgia Ry. Co. v. A. F. Merrill & Co.*, Ala., 45 So. Rep. 628.

26.—**Negligence.**—A passenger taking a train may rely on the duty of the railroad company to keep the track clear between train and station.—*Harper v. Pittsburg, C. & St. L. Ry. Co.*, Pa., 68 Atl. Rep. 831.

27.—**Wrongful Ejection of Passenger.**—If a passenger is drunk and boisterous or annoys other passengers, or if he fails to deliver his ticket to the conductor or refuses to pay his fare, the conductor may eject him from the train, using no more force than is necessary for that purpose.—*Chesapeake & O. Ry. Co. v. Robinette*, Ky., 107 S. W. Rep. 763.

28. **Certiorari—Private Prosecutors.**—Power to make and effect of making others than the municipality parties to certiorari to review municipal proceedings stated.—*Specht v. Central Passenger Co.*, N. J., 68 Atl. Rep. 783.

29. **Commerce—Taxation.**—For property of a foreign corporation to be exempt from taxation under the commerce clause of the federal constitution, there must be a continuous movement of merchandise in interstate commerce.—*Lehigh & Wilkes-Barre Coal Co. v. Borough of Junction*, N. J., 68 Atl. Rep. 806.

30. **Conspiracy—Evidence to Establish.**—A conspiracy to commit a crime may be and usually must be, from the nature of the case, proved by inference from the acts of the parties and their co-operation.—*Smith v. United States*, U. S. C. C. of App., Eighth Circuit, 157 Fed. Rep. 721.

31. **Constitutional Law—Construction of Provisions.**—The rule that, as exceptions strengthen the force of the general law, so enumeration weakens as to things not enumerated, applies to the provisions of the constitution.—*Western Union Telegraph Co. v. Railroad Commission of Louisville, Ky.*, 45 So. Rep. 598.

32.—**Criminal Prosecutions.**—Loc. Laws 1894-5, p. 425, sec. 1, amending Laws 1890-91, pp. 561, 562, secs. 4, 10, relating to drawing jurors from the territory within two miles of the courthouse in Jefferson county in capital cases, held not a violation of Const. 1901, art. 1, sec. 6, requiring trial by a jury of the county or district in which the offense was committed.—*Wray v. State*, Ala., 45 So. Rep. 697.

33.—**Legislative Powers.**—The legislature has no power to exempt any particular person or corporation from the operation of the general laws, or to impose special conditions on rights of action against a corporation.—*Milton v. Bangor Ry. & Electric Co.*, Me., 68 Atl. Rep. 826.

34.—**Obligation of Contracts.**—The provision in the charter of the Camp Meeting Association of the Newark Conference (P. L. 1869, p. 484) exempting its property from taxation was a mere gratuity, and did not constitute an irrepealable contract.—*Hanover Tp. v. Camp Meeting Ass'n of Newark Conference*, N. J., 68 Atl. Rep. 753.

35. **Corporations—Interstate Commerce.**—A decision of the supreme court of the United States on the question of the power of states to regulate interstate commerce by requiring the stopping of trains is binding on the state courts.—*St. Louis, I. M. & S. Ry. Co. v. State*, Ark., 107 S. W. Rep. 989.

36.—**Receivers.**—Generally speaking an officer or director of an insolvent corporation should not be appointed receiver for its property, especially where he has contributed to its mismanagement.—*Coy v. Title Guarantee & Trust Co.*, U. S. C. C., D. Oreg., 157 Fed. Rep. 794.

37.—**Ultra Vires Contracts.**—Where the business of a corporation which it is required to transact is lawful, there is no presumption that a contract made in pursuance to such business is ultra vires.—*Edwards v. National Window Glass Jobbers' Ass'n*, N. J., 68 Atl. Rep. 800.

38.—**What Law Governs.**—Where a corporation sought to cancel certain stock issued to its president, under a contract both illegal and inherently fraudulent, the corporation as a condition to such relief was not required to render compensation to the president for his services as such.—*Central Consumers' Wine & Liquor Co. v. Madden*, N. J., 68 Atl. Rep. 777.

39. **Criminal Evidence**—Confronting Opposing Witness.—Permitting a witness for the state to answer a certain question after announcing that the witness was so dangerously ill that to examine him would be inhuman, etc., held a denial of an accused's right to be confronted by opposing witnesses, and a refusal to exclude the answer held error.—*Wray v. State*, Ala., 45 So. Rep. 697.

40. **Matters of Opinion**.—In a prosecution for homicide, defendant having offered in evidence the showing for a certain witness, it was competent to show by persons acquainted with the names of the residents of the community that no such person lived in the community.—*Walker v. State*, Ala., 45 So. Rep. 640.

41. **Res Gestae**.—To authorize the admission of a declaration by deceased after he was shot as *res gestae*, it must be shown to have stood in such immediate causal relation to the shooting as to have been an emanation thereof.—*Baker v. State*, Ark., 107 S. W. Rep. 983.

42. **Criminal Law**—Self Defense.—An instruction that if defendant was the aggressor in the first instance, yet his right of self-defense in the house would be revived, provided he had abandoned the difficulty, held favorable to defendant, and not on the weight of the evidence.—*Davis v. State*, Tex., 107 S. W. Rep. 851.

43. **Criminal Trial**—Argumentative Instructions.—A charge that, before accused can be convicted, the evidence must be such as would cause a reasonable and prudent man to hesitate and pause in the graver transactions of life, is properly refused as argumentative.—*Lacy v. State*, Ala., 45 So. Rep. 680.

44. **Giving Instructions**.—Where instructions were indorsed "Given," and handed to the jury, defendant, not having requested that they be read to the jury until the jury had left the box, was not entitled to an exception to the court's refusal to read them to the jury.—*Boyd v. State*, Ala., 45 So. Rep. 634.

45. **Jurisdiction**.—Though one accused of an offense may demand a trial in the county where the offense was committed, the legislature may empower the courts of a village in one county to try offenders against the village ordinances committed in an adjoining county.—*Town of Gower v. Agee*, Mo., 107 S. W. Rep. 999.

46. **Request to Charge**.—Where a request to charge used the word "defendant" where the name of the assaulted party was intended, the charge was fatally defective, and, if otherwise good, was properly refused.—*Moore v. State*, Ala., 45 So. Rep. 656.

47. **Damages**—Deeds.—A good general grant will not be limited by a subsequent particular description, unless an intention definitely appears from the terms of the particular description to limit the general grant.—*Barksdale v. Barksdale*, Miss., 45 So. Rep. 615.

48. **Excessive Verdict**.—In an action against a sleeping car company for failing to inform a passenger of the arrival at her destination, a verdict allowing her \$1,000 compensatory and \$500 punitive damages held excessive.—*Pullman Co. v. Lutz*, Ala., 45 So. Rep. 675.

49. **Measure of Damages**.—Where a building sold for removal is burned by the seller's negligence, the measure of damages is not necessarily the purchase money paid, but the value of the building as it stood on the land is the standard.—*Tighe v. Atchison, T. & S. F. Ry. Co.*, Mo., 107 S. W. Rep. 1034.

50. **Mental Suffering**.—The mere desire and intention to attend a theatrical performance, a dance, a concert or other such amusement held not to involve any such sentiments or emotions as to allow recovery for mental anguish in suits for breach of contract in refusing admission to such amusements after the purchase of tickets.—*Buenzie v. Newport Amusement Ass'n*, R. I., 68 Atl. Rep. 721.

51. **Mental Suffering**.—In an action by a parent for negligent injury to a minor, he may recover only compensatory damages, not including recovery for mental suffering by himself.—*Reeves v. Anniston Knitting Mills*, Ala., 45 So. Rep. 702.

52. **Descent and Distribution**—Action by Distributees.—In a suit by next of kin to enjoin the disposition of personality, evidence held to show the personality belonged to decedent, and not to defendant.—*Buchanan v. Buchanan*, N. J., 68 Atl. Rep. 780.

53. **Disturbance of Public Assemblage**—Religious Worship.—In a prosecution for disturbing religious worship consisting of a Christmas tree celebration, evidence that preacher when announcing the celebration stated that he expected to be present held admissible.—*Stafford v. State*, Ala., 45 So. Rep. 673.

54. **Estoppel**—Denial of Liability.—An employer issuing non-transferable checks to its employees held not estopped from denying a transferee's right to recover on them.—*Kanjutsky v. Tennessee Coal, Iron & R. Co.*, Ala., 45 So. Rep. 676.

55. **Evidence**—Documentary.—The signing of a note by the maker having been proved, it was properly admitted in evidence in an action against him thereon.—*Clayton v. Ingram*, Tex., 107 S. W. Rep. 880.

56. **Expert Testimony**.—In an action for damages for personal injuries, if a physician can form no opinion of plaintiff's present state, without considering the history of the case and prior symptoms as related by plaintiff, his opinion is incompetent.—*Gibler v. Quincy, O. & K. C. R. Co.*, Mo., 107 S. W. Rep. 1021.

57. **Expert Testimony**.—An expert should not give his opinion from his reading of depositions containing evidence subject to different interpretations by different witnesses.—*Tighe v. Atchison, T. & S. F. Ry. Co.*, Mo., 107 S. W. Rep. 1034.

58. **Judicial Notice**.—Courts will take judicial notice of the appointment and tenure of office of a member of the President's cabinet.—*Frederick v. Goodbee*, La., 45 So. Rep. 606.

59. **Lost Will**.—To sustain the burden of proof in proving the existence and contents of a lost will or proving an agreement to bequeath by will or mutual mistake, the evidence must be clear and convincing, and such as to satisfy the mind of the court.—*Liberty v. Haines*, Me., 68 Atl. Rep. 738.

60. **Executors and Administrators**—Contract to Sell Land.—An administratrix's contract to sell land under an order from the orphans' court may be specifically enforced; and the heirs of decedent are not necessary nor proper parties to such suit.—*Campbell v. Hough*, N. J., 68 Atl. Rep. 759.

61. **Homestead**.—Where testator devised a homestead to his wife for life, remainder to grandchildren, held, in determining whether the testator's intention was that the entire homestead be sold to satisfy his debts, or only the

remainder interest, the situation and relationship of the parties and the terms of the will would be considered.—*Marx v. Haley*, Miss., 45 So. Rep. 612.

62. **Federal Courts**—Validity of State Statute.—The only remedy to correct a decision of the highest court of a state in chancery cases, as well as in actions at law, is by a writ of error to the supreme court of the United States.—*Chicago, R. I. & P. Ry. Co. v. Swanger*, U. S. C. C., N. D. Mo., 157 Fed. Rep. 783.

63. **Fines**—Involuntary Servitude.—A contract made under Code 1896, sec. 4751, binding a person convicted of a misdemeanor to work for his surety until the fines and costs are paid above the money advanced for his living expenses held void as exacting involuntary servitude for debt.—*Elston v. State*, Ala., 45 So. Rep. 667.

64. **Fixtures**—Henhouse.—A henhouse erected on another's land with the privilege of removal remains the property of the builder.—*Pile v. Holloway*, Mo., 107 S. W. Rep. 1043.

65. **Fraud**—Presumptions.—Though fraud is not presumed and must be proved, it may be deduced from circumstances and conditions which afford strong presumptions of its existence.—*Buchanan v. Buchanan*, N. J., 68 Atl. Rep. 780.

66. **Frauds, Statute of**—Sale of Real Estate.—The statute of frauds is satisfied by the signature of an agent to an agreement to convey lands, if the agent has express authority to bind the principal by writing, which authority may be shown by parol.—*Campbell v. Hough*, N. J., 68 Atl. Rep. 759.

67. **Fraudulent Conveyances**—Evidence.—Evidence that, before the execution of a chattel mortgage, the mortgagee had made an oral promise to pay the mortgagor's debts, held incompetent for the purpose of proving that the mortgage was fraudulent as to creditors.—*Beeler v. Perry*, Mo., 107 S. W. Rep. 1008.

68. **Guardian and Ward**—Parol Exchange of Land.—Parol exchange of land by mother and infant daughter with consent of guardian held invalid against the estate of the daughter, who died before she became of age.—*Sayers v. Pollock*, Pa., 68 Atl. Rep. 772.

69. **Homicide**—Dying Declarations.—Dying declarations of the victim are only admissible in a prosecution for homicide when the declarant had given up all hope of recovery at the time they were made.—*Johnson v. Commonwealth*, Ky., 107 S. W. Rep. 768.

70. **Malice**—The law presumes malice from the use of a deadly weapon, and casts on defendant the burden of repealing the presumption, unless the evidence proving the guilt shows an absence of malice.—*Burkett v. State*, Ala., 45 So. Rep. 682.

71. **Requisites of Indictment**—An indictment for shooting into a wagon filled with several persons, and shooting D., should charge that accused shot into a wagon wherein was D. and divers others with felonious intent of killing some one or more of them, and, in fact, shot D.—*Gentry v. State*, Miss., 45 So. Rep. 721.

72. **Self-Defense**—It was not error to fail to define manslaughter or submit aggravated assault, where defendant, convicted of assault with intent to murder, under his own statement shot in self-defense.—*Moore v. State*, Tex., 107 S. W. Rep. 833.

73. **Husband and Wife**—Injuries.—The right to compensation for the wrongful injury to a

wife's ability to perform labor beyond that pertaining to the care of the household and family belongs to the wife, and not to the husband.—*Kirkpatrick v. Metropolitan St. Ry. Co.*, Mo., 107 S. W. Rep. 1025.

74. **Rights of Survivor**—A widow held entitled to sue in her own name for damages and reformation of a deed made to herself and husband prior to his decease, in exchange for land belonging to them, her husband having only a life estate in the land so conveyed to them.—*Gregory v. Copeland*, Ky., 107 S. W. Rep. 768.

75. **Infants**—Contracts.—In a suit on a note against a minor, evidence considered, and held sufficient to sustain a verdict for plaintiff on the issue of fraud and minority set up by defendant.—*Clayton v. Ingram*, Tex., 107 S. W. Rep. 880.

76. **Injunction**—Affidavits.—The cross-examination of one whose affidavit accompanies the bill, or is presented by defendant in a cause in which an injunction is prayed, taken under court of chancery rule 124a, is held available to the adverse party, though the party procuring and conducting the cross-examination sees fit not to use it.—*Campbell v. Hough*, N. J., 68 Atl. Rep. 759.

77. **Preliminary Injunction**—Where, in an injunction suit, the affidavit to the bill was defective, such defect should have been pointed out at the proper time, and defendant may not rely thereon to cure a defective affidavit to his answer.—*Empire Guano Co. v. Jefferson Fertilizer Co.*, Ala., 45 So. Rep. 657.

78. **Jankeepers**—Negligent Operation of Elevator.—The proprietor of a hotel operating a passenger elevator therein must exercise at least ordinary care as to every person having lawful business on the premises.—*McCrocken v. Meyers*, N. J., 68 Atl. Rep. 805.

79. **Intoxicating Liquors**—Local Option.—A local option election held only for a part of the territory originally adopting local option, being on that account void ab initio, need not be held valid until contested by competent authority, and its invalidity may be determined in a collateral proceeding.—*Oxley v. Allen*, Tex., 107 S. W. Rep. 945.

80. **Unlawful Sale**—That defendant was subpoenaed to produce "his" internal revenue license, and did not do so, did not authorize one who had examined the internal revenue collector's books to testify concerning a license issued to another.—*Biddy v. State*, Tex., 107 S. W. Rep. 814.

81. **Judgment**—Lien.—To establish the existence of a judgment lien, the burden is upon the lienor to prove the issue of an execution on his judgment within twelve months after its rendition, as expressly required by Sayles' Rev. Civ. St. 1897, art. 3293.—*Bourn v. Robinson*, Tex., 107 S. W. Rep. 873.

82. **Jury**—Exclusion of Negroes.—Discrimination against negroes in selection of a jury list held to violate the sixth amendment to the constitution of the United States, guaranteeing to an accused in a criminal prosecution a trial by an impartial jury.—*Farrow v. State*, Miss., 45 So. Rep. 619.

83. **Juror Witness in Same Cause**—While the fact that a juror has been summoned as a witness in a case is good ground for challenge for cause, it is reversible error for the trial court, of its own motion, to exclude a juror on such ground against the objection of defendant.—*Walker v. State*, Ala., 45 So. Rep. 640.

84. **Justices of the Peace**—Jurisdiction.—An

action against a carrier for breach of contract for the carriage and delivery of goods may be in form either *ex contractu* or *ex delicto*, and in either form a justice of the peace has jurisdiction.—*St. Louis & N. A. R. Co. v. Willson*, Ark., 107 S. W. Rep. 978.

85. **Larceny—Possession by Owner.**—Defendant held not entitled to an acquittal of larceny on the theory the property was not in defendant's possession when stolen.—*Crouch v. State*, Tex., 107 S. W. Rep. 859.

86. **Libel and Slander—Malice.**—What would otherwise be a privileged or qualifiedly privileged communication is not so where the publisher is actuated by malice.—*Stewart v. Codrington*, Fla., 45 So. Rep. 809.

87. **Literary Property—Compilation from Public Records.**—A compiler from public records and other sources of an abstract of title to lands held entitled to the exclusive use of the abstract until published.—*Vernon Abstract Co. v. Waggoner Title Co.*, Tex., 107 S. W. Rep. 919.

88. **Logs and Logging—Enforcement of Lien.**—Where the true mark on logs is correctly given in the writ in an action to enforce a logging lien, the mark itself identifies the logs, and the name given to the mark in the writ is immaterial.—*Brogan v. McEachern*, Me., 60 Atl. Rep. 322.

89. **Performance of Contract.**—The owner of land who sold certain timber thereon, to be removed in a reasonable time, but prevented its removal by threats and intimidation, held estopped to assert that it was not removed within the time agreed.—*Hurst v. Taylor*, Ky., 107 S. W. Rep. 743.

90. **Malicious Prosecution—Contempt Proceedings.**—Person adjudicated in contempt and discharged on payment of costs cannot maintain action for malicious prosecution against petitioner in contempt proceedings.—*Hoskins v. Somerset Coal Co.*, Pa., 68 Atl. Rep. 843.

91. **Probable Cause.**—Where advice of an attorney was obtained in good faith, though the person accused may succeed in proving his innocence, the parties cannot be held to have acted through malice.—*Kirk v. Wiener Loeb Laundry Co.*, La., 45 So. Rep. 738.

92. **Mandamus—Hearing on Agreed Case.**—Mandamus will not lie to compel a judge to proceed with an agreed case before hearing a suit to cancel the agreement to submit the case, as his action may be reviewed by appeal or error.—*State v. McCune*, Mo., 107 S. W. Rep. 1030.

93. **Maritime Liens—Master's Authority to Pledge Credit.**—A master's authority to pledge the credit of his ship is limited by the rule of necessity, and whoever extends to him credit beyond what is reasonably necessary in the prudent management of the vessel acquires no lien therefor.—*The Charles E. Falk*, U. S. D. C., N. D. Wash., 157 Fed. Rep. 780.

94. **Master and Servant—Assumed Risk.**—Where a servant knew of a defect in the appliances, or it was plainly observable, if he appreciated that it was dangerous, he assumed the risk.—*American Smelting & Refining Co. v. McGee*, U. S. C. C. of App., Eighth Circuit, 157 Fed. Rep. 69.

95. **Assumed Risk.**—Employee of a railroad company obeying an order of the conductor in charge of a train, commanding him to go into a place of apparent extra hazard, will do so at his own risk.—*Atlantic Coast Line R. Co. v. Beazley*, Fla., 45 So. Rep. 761.

96. **Assumption of Risk.**—An employee of a railroad company whose duties required him to pass through defendant's railroad yards held not to have assumed the risk of being struck by cars.—*Missouri, K. & T. Ry. Co. of Texas v. Ballet*, Tex., 107 S. W. Rep. 906.

97. **Contributory Negligence.**—Defendant in an action for personal injuries is entitled to a requested charge grouping the facts relied on as constituting plaintiff's contributory negligence, even though the plea is not as specific as the testimony relating thereto.—*Galveston, H. & S. A. Ry. Co. v. Worth*, Tex., 107 S. W. Rep. 958.

98. **Leases.**—That about the time complainant leased a fruit stand he formed a partnership does not defeat his right to recovery individually for breach of the lessor's covenants; there being no proof of an assignment of the lease to the partnership.—*Metzger v. Brincat*, Ala., 45 So. Rep. 633.

99. **Personal Injuries.**—Where premises about which a servant is employed are known by him to be defective, but the danger is not apparent and he has no knowledge thereof, he does not assume the risk.—*Marshall v. St. Louis Southwestern Ry. Co. of Texas*, Tex., 107 S. W. Rep. 883.

100. **Risks Assumed by Servant.**—The risks assumed by the servant as part of his contract of employment are those which naturally and incidentally belong to the business as long as it is conducted by the master within the limits of reasonable care.—*Huston v. Quincy, O. & K. C. R. Co.*, Mo., 107 S. W. Rep. 1045.

101. **Monopolies—Restraint of Trade.**—Allegations of an answer setting up Act Jan. 23, 1905 (Acts 1905, p. 1), imposing certain penalties upon trusts, monopolies, etc., doing business within the state, held not to amount to an averment that plaintiffs were transacting business within the state when goods were sold.—*Frank A. Menne Factory v. Harback Bros.*, Ark., 107 S. W. Rep. 991.

102. **Municipal Corporations—Charter Powers.**—Powers delegated to municipalities by the legislature are intended to be exercised in conformity to and consistent with the general laws of the state.—*Crittenden v. Town of Booneville*, Miss., 45 So. Rep. 723.

103. **Defective Sidewalks.**—A man with poor eyes, with a basket of vegetables on his head, has a right to assume within reasonable limits that, if sidewalks have been made unsafe, those who have made them so will warn him of the fact.—*Rock v. American Const. Co.*, La., 45 So. Rep. 741.

104. **Demolition of Buildings.**—A municipal corporation held *prima facie* liable for the unlawful demolition of a private building by direction of its board of trustees.—*Faucheux v. Town of St. Martinville*, La., 45 So. Rep. 600.

105. **Extra-Territorial Jurisdiction.**—An ordinance affecting dramshops within one-half mile of the village limits adopted under Rev. St. 1899, sec. 6010 (Ann. St. 1906, p. 3034) held a valid police regulation as to persons residing within the half-mile limit, but in another county, and not unreasonable as to such persons as an extra-territorial revenue measure.—*Town of Gower v. Agee*, Mo., 107 S. W. Rep. 999.

106. **Retrospective Taxation.**—Property previously omitted from municipal taxation may be retrospectively assessed, though the taxpayer, at the time the omitted property should have been assessed, listed all the property with the assessor which the assessor deemed subject

to assessment.—*Hogan v. City of Louisville, Ky.*, 107 S. W. Rep. 809.

107. **Nuisance—Pipe Lines.**—Defendants maintaining pipe lines constituting a nuisance near plaintiff's premises held not to be excused by the permission of the commissioners' court nor by freedom from negligence.—*Sun Co. v. Wyatt, Tex.*, 107 S. W. Rep. 934.

108. **Officers—Election to Fill Vacancy.**—A congressional election held not an election at which a vacancy in the board of trustees of a city of the sixth class could be filled under Const. sec. 152.—*Provence v. Lucas, Ky.*, 107 S. W. Rep. 755.

109. **Parent and Child—Minor Employees.**—In an action by a parent for personal injury to a minor employed by defendant, facts held insufficient to show contributory negligence defeating recovery.—*Reeves v. Anniston Knitting Mills, Ala.*, 45 So. Rep. 702.

110. **Partition—Estoppel.**—A defendant held entitled to no interest in certain land in view of an estoppel by a partition by act of certain land in view of an estoppel by a partition by act of certain parties through whom he claimed.—*Berryman v. Biddle, Tex.*, 107 S. W. Rep. 922.

111. **Pleading—Amendment.**—A new cause of action is not set up by amendment where the same substantial facts are pleaded merely in a different form, so that a recovery on the amended complaint would bar a recovery on the original complaint.—*Alabama Consol. Coal & Iron Co. v. Heald, Ala.*, 45 So. Rep. 686.

112.—**Facts or Conclusions.**—In an action by stockholders against a corporation, corporate rights may be stated as legal conclusion. Instead of stating the facts which support them, where they are stated merely as an inducement to the contract sued on.—*Edwards v. National Window Glass Jobbers' Ass'n, N. J.*, 68 Atl. Rep. 800.

113.—**Striking Out Matters.**—In replevin by a mortgagee against an officer holding the property under an attachment in favor of a creditor of the mortgagor, where the answer is a general denial, the portion of the answer reciting the proceedings in the attachment suit should be stricken out on motion.—*Beeler v. Perry, Mo.*, 107 S. W. Rep. 1008.

114. **Principal and Agent—Authority of Agent.**—A person dealing with an agent is bound to know that he has no authority to apply his private debt to such person to the payment of the debt due by such person to his principal.—*Maloney Mercantile Co. v. Dublin Quarry Co., Tex.*, 107 S. W. Rep. 904.

115. **Prohibition—Nature of Writ.**—The writ of prohibition is an extraordinary writ, and is proper to be issued only in cases of extreme necessity.—*Crittenden v. Town of Booneville, Miss.*, 45 So. Rep. 723.

116. **Quietting Title—Relief to Defendant.**—Where one placed improvements on land under a mistaken belief that the premises were within a tract conveyed to him, he and one claiming under him have the right to remove the improvements, as against the owner suing in equity to quiet title.—*Jonesville Perpetual Building & Loan Ass'n of Jonesville v. Beverly, Ky.*, 107 S. W. Rep. 770.

117. **Real Actions—Pleadings.**—A complaint in a civil action at law may be amended any time before the cause is finally submitted to the jury and the retirement of the jury, if the

form of action is not changed or a new cause of action substituted, or if there is not an entire change of the parties thereto.—*Townes v. Dallas Mfg. Co., Ala.*, 45 So. Rep. 696.

118. **Receiving Stolen Goods—Elements of Crime.**—It is essential to a conviction for receiving stolen goods that the receiver have knowledge that the property was stolen at the time of its reception, or such notice as would put him on inquiry.—*Minor v. State, Fla.*, 45 So. Rep. 818.

119. **Records—Conclusiveness.**—The judgment of the court substituting papers for lost papers in a criminal case cannot be attacked by affidavits, although it may be shown that the substituted papers have been incorrectly copied in the record.—*Davis v. State, Tex.*, 107 S. W. Rep. 828.

120. **Reference—Matter Subject to Reference.**—Where accounts between parties are voluminous, comprising the history of scores of transactions covering a period of many years, and the correctness of some items is impugned, a reference may be ordered to state the account.—*Speakman v. Vest, Ala.*, 45 So. Rep. 667.

121. **Religious Societies—Incorporation.**—Where members of a church, pursuant to a meeting duly held, formed a corporation under Code 1896, sec. 1303, a subsequent attempt by other members of the church to incorporate themselves to defeat such former incorporation was void.—*Polk v. State, Ala.*, 45 So. Rep. 652.

122. **Schools and School Districts—Trustees.**—Where a school trustee was elected to a three-year term as trustee and his election was certified to the county superintendent, it was not invalidated by the latter's failure to record his election as for the three-year term.—*Gilbert v. Lucas, Ky.*, 107 S. W. Rep. 751.

123. **Specific Performance—Pleading.**—Complainant in specific performance who has not specially prayed that he have specific performance against one tenant in common under an agreement void as to a co-tenant may amend.—*Campbell v. Hough, N. J.*, 68 Atl. Rep. 759.

124. **Statutes—Construction.**—Where two acts are passed at the same session of the legislature, they should be construed as one act, and, if possible, so that both may stand.—*Garrison v. Richards, Tex.*, 107 S. W. Rep. 861.

125. **Street Railroads—Failure to Repair Streets.**—An acceptance by a street railway company of a franchise, coupled with the duty of keeping portions of the streets in repair, gives a right of action against the company to a traveler injured by neglect of that duty.—*Milton v. Bangor Ry. & Electric Co., Me.*, 68 Atl. Rep. 826.

126. **Taxation—Collection.**—A deputy sheriff collecting taxes is not a mere debtor to the state and county, but sustains the relation of trustee to them.—*Hill v. Fleming, Ky.*, 107 S. W. Rep. 764.

127.—**Property Subject.**—Vessels owned by a New Jersey corporation, having its principal office in one county, are not taxable in a municipality in another county, though registered pursuant to act of congress in the latter municipality.—*American Mail S. S. Co. v. Crowell, N. J.*, 68 Atl. Rep. 752.

128. **Telegraphs and Telephones—Rights on Bridges.**—Where telegraph company obtained from bridge company right to maintain wires on bridge, and county condemned the bridge, it could not maintain bill to compel removal of wires; it having adequate remedy at law.—*Bea-*

ver County v. Central District & Printing Telegraph Co., Pa., 68 Atl. Rep. 846.

129. **Theaters and Shows**—Right to Admission.—A ticket of admission to a race track, a theater, a concert, or any such entertainment is a mere revocable license.—Buenzle v. Newport Amusement Ass'n, R. I., 68 Atl. Rep. 721.

130. **Trade-Marks and Trade-Names**—Unfair Competition.—The proprietor of the Hunyadi Janos Spring water held not entitled to an injunction to restrain the sale of a manufactured water under the label "Carbonated Artificial Hunyadi, Conforming to Fresenius' analysis of the Hunyadi Janos Springs," either on the ground of infringement of trade-mark or of unfair competition.—Saxlehner v. Wagner, U. S. C. C. of App., Sixth Circuit, 157 Fed. Rep. 745.

131. **Trespass**—Title to Land.—Where defendants in trespass for cutting trees on swamp land reconvened, asking to be recognized as owners of the land and of the trees taken therefrom, they opened the door to plaintiffs to prove up their title.—Frederick v. Goodbee, La., 45 So. Rep. 606.

132. **Trial**—Instructions.—Where all the evidence on the question of adverse possession in trespass to try title shows that possession began at the date of a certain deed in evidence, the court did not err in assuming that date from which to compute the period of limitation.—Dunn v. Taylor, Tex., 107 S. W. Rep. 952.

133.—**Verdict**.—Where a declaration contains two counts and the verdict finds for plaintiff on one specified count for an amount less than claimed in that count, held a finding for defendant on the count not mentioned.—Mariana Mfg. Co. v. Boone, Fla., 45 So. Rep. 754.

134. **Trusts**—Following Trust Property.—As between the cestui que trust and the trustee and persons claiming under him otherwise than by purchase without notice, all property belonging to the trust and the fruit thereof held to remain a subject of the trust.—Hill v. Fleming, Ky., 107 S. W. Rep. 764.

135.—**Power of Beneficiary to Dispose of Property**.—A deed creating a trust for the benefit of the wife of the grantor, with power to her to dispose of the property, construed, and held to authorize the wife, during the lifetime of the husband, to convey the premises.—Mandel v. Fidelity Trust Co., Ky., 107 S. W. Rep. 775.

136.—**Right to Recover Trust Fund**.—The mere misapplication of a trust fund does not create a general lien on the tort-feasor's estate, but to entitle the owner to recover such fund from a receiver of the trustee, it must be traced either in its original form or into specific property which passed to the receiver.—Board of Com'rs of Crawford County, Ohio, v. Strawn, U. S. C. C. of App., Sixth Circuit, 157 Fed. Rep. 49.

137.—**Spendthrift Trusts**.—An instrument held to have created a spendthrift trust so that neither the capital nor income was subject to claims against the beneficiary.—Castree v. Shotwell, N. J., 68 Atl. Rep. 774.

138. **Vendor and Purchaser**—Breach of Contract.—The owner of coal land agreeing to sell on payment of a certain sum on or before three months from date of delivery of deed cannot claim a forfeiture for default where no deed was tendered.—McHenry v. Mitchell, Pa., 68 Atl. Rep. 729.

139.—**Contract of Sale**.—Where defendant contracted to sell real estate to plaintiff, his

heirs and assigns, but was unable to secure his wife's relinquishment of dower, he failed to make a marketable title, and was liable for breach of contract.—Vaughan v. Butterfield, Ark., 107 S. W. Rep. 993.

140.—**Options**.—An option is an unaccepted offer to sell and convey within the time fixed and on the conditions set forth in the written agreement.—Barnes v. Rea, Pa., 68 Atl. Rep. 336.

141. **Waters and Water Courses**—Defective Culvert.—Where a railroad company maintains a culvert adequate to carry off the natural and usual water, it is not liable for injuries to land resulting from extraordinary rainfall.—Wallingford v. Maysville & B. S. Ry. Co., Ky., 107 S. W. Rep. 781.

142. **Wills**—Construction.—Machinery, type, and material necessary to a newspaper plant held within the principle that a bequest for life of things whose use is their consumption vests in the legatee the absolute property therein.—Seabrook v. Grimes, Md., 68 Atl. Rep. 883.

143.—**Construction by Trustees**.—A provision of a will that the testator's trustees should conclusively determine all questions of construction without resort to the courts, held to authorize the trustees to determine what property the will applied to.—Couts v. Holland, Tex., 107 S. W. Rep. 913.

144.—**Contest**.—One contesting a will for testamentary incapacity and undue influence, and because the will was not duly executed, waives any right to object to the authority of proponent to make proof of the will.—Hodge v. Rambo, Ala., 45 So. Rep. 678.

145.—**Life Estate**.—A will held to entitle testator's widow to use the principal of the estate as far as she, acting in good faith, might deem necessary for her support in comfort.—Reed v. Reed, Conn., 68 Atl. Rep. 849.

146.—**Undue Influence**.—Where testatrix had testamentary capacity, and the will was executed with all requisite formalities, a contestant claiming undue influence must not only prove its existence, but show that it resulted in a will other than that testatrix would otherwise have made.—Byrnes v. Gibson, N. J., 68 Atl. Rep. 756.

147. **Witnesses**—Examination.—A question whether witness ever heard a person named state anything as to the ownership of lands held too broad.—East Coast Lumber Co. v. Ellis-Young Co., Fla., 45 So. Rep. 826.

148.—**Explanation of Testimony**.—In an equitable action against an heir and her husband for an accounting for property alleged to be withheld by them from the estate, where they are examined as witnesses for plaintiff as to their dealings with decedent, held that they should be allowed to testify to details of their dealings and explain them.—Elsentraut v. Cornelius, Wis., 115 N. W. Rep. 142.

149.—**Impeachment**.—A party discrediting a witness of the adverse party by the record of conviction of one having the same name as that of the witness need not identify the witness as the one convicted.—Clifford v. Pioneer Fireproofing Co., Ill., 83 N. E. Rep. 448.

150.—**Right to Cross-Examine**.—Under Const. 1901, art. 1, sec. 6, providing that the accused in criminal prosecutions has a right to be confronted by the witnesses against him, an accused has a constitutional privilege of cross-examining opposing witnesses.—Wray v. State, Ala., 45 So. Rep. 697.

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A DECISION HOLDING THAT TIME BEING THE ESSENCE OF A PAVING CONTRACT, A BOARD OF ALDERMEN CANNOT EXTEND THE TIME FOR PERFORMANCE.

This decision of the Kansas City court of appeals, in the case of the city of Independence v. Knoepfker, not yet reported, is after the fashion of that in the case of Lyons v. City of St. Joseph, 61 Cent. L. J. 2, 87 S. W. Rep. 588, which we duly criticised at the time. The laws of the Medes and Persians are back numbers compared to these decisions of the Kansas City court. The late case of this court arose in an action on a special tax bill belonging to a series issued by the city of Independence, a city of the third class, in payment of the cost of paving one of its streets. The validity of the proceedings leading to the issuance of the tax bill is attacked in the answer on a number of grounds. After hearing the evidence, the court peremptorily directed a verdict for defendants, and the cause was heard on the appeal of plaintiffs from the judgment rendered on the verdict given in obedience to that instruction.

Among the points raised against the tax bill, defendants contend that as the ordinance authorizing the improvement made the time of its completion of the essence of the contract, the failure of the contractor to finish the work in the time specified is fatal to the validity of the assessment. The ordinance passed June 21, 1898.

To get a fair view of the opinion we quote from it as follows:

"As to the time allotted for the doing of the work, the contract provided: 'The work embraced in this contract shall be begun within thirty days after this contract binds

and takes effect, and shall be prosecuted regularly and uninterruptedly thereafter (unless the city engineer shall especially direct otherwise in writing), with such force as to secure its full completion within 90 days from date of its confirmation; the time of beginning, rate of progress, and the time of completion being essential conditions of this contract. And if the contractor shall fail to complete the work within the time above specified, an amount equal to the sum of ten dollars per day for each and every day thereafter, until such completion, shall be deducted, as liquidated damages for such breach of this contract from the amount of the final estimate of said work.' Plaintiff insists that this contractual stipulation was embodied in the specifications on file in the office of the city clerk at the time the initial ordinance was passed, but this is denied by defendants, who say that it first appeared in specifications which accompanied the bid of the successful bidder. In our discussion of the questions of law involved, we shall adopt plaintiff's view of the disputed fact and assume that the stipulation appeared in the original specifications.

The period of 90 days allotted for the completion of the work expired on the 29th day of November, and on that day the work was to be finished. Before the expiration of the period an ordinance was passed by the city council extending the time, and work was completed on the 18th day of December, within the time thus extended."

The court further says:

"Where the ordinance authorizing the improvement omits to fix a time for its completion, the contract may provide a reasonable time limit, and one thus stated will be accepted as *prima facie* evidence of what is reasonable, because the parties themselves have contracted that it is reasonable. *Hund v. Rackliffe*, 192 Mo. 1. c.

325. . . . But where the ordinance prescribes a definite time for doing the work, a different rule obtains. Time then becomes an essential element of the contract, and bidders are advised that in all events the work must not be prolonged beyond the period fixed. Provisions afterward inserted in the contract which attempt to soften the rigor of the ordinance are nugatory, and courts will disregard them. Nor will the council be permitted to extend the time by ordinance. This inflexible rule is supported by sound reason. . . . And it follows that should we find the ordinance made time essential, neither the conflicting provisions of the contract nor the ordinance to extend the time will serve to make valid that which is invalid under the terms of the first ordinance."

The court then goes on to say:

"We do not consider these views at variance with the opinion of the supreme court in *Hund v. Rackliffe*, *supra*. There is a dictum in the opinion which lends countenance to the contention of plaintiff that the council might extend the time by ordinance even in cases where time was specified in the initial ordinance, but we do not understand the supreme court intended to decide that question, and do understand that the scope of the decision was intended to be confined to the question determined in the excerpt quoted."

Now the opinion in the *Hund* case, 92 Mo. 324, is to the effect that, "no good reason has been given, or is conceivable, why the municipal assembly should not have power to extend the time for the completion of a contract beyond the period specified therefor in the original ordinance, if the extending ordinance is passed prior to the expiration of the time limited in the original ordinance; and likewise no good reason appears why the municipal assembly should not have power to extend the time under such circumstances, when no time was specified in the original ordinance and the time limited was specified only in the contract. In the absence of a time limit in the ordinance, it has always been the rule in this state, as emphasized by the decision in *Heman v. Gilliam*, that

the contract may specify a time, but that such time specified in the contract must be a reasonable time, and that the time specified in the contract is, *prima facie*, a reasonable time, because the parties themselves have so agreed. But where, for any good reason shown, as the inability of the contractor to procure a portion of the materials necessary for the doing of the work, as appears in this case, the work cannot be completed within the contract time, it would be a narrow, strained, unnatural and unreasonable construction of the law to hold that the municipal assembly had not the power, during the life of the contract, to extend the time for the completion of the work; for such act of the municipal authorities would be a legitimate determination of what constitutes a reasonable time, and, as no appreciable damage could thereby ensue to the property owner by the extension, the courts will not interfere with the legislative determination of the reasonableness of the time for the completion of the work."

Assuming that this opinion of the supreme court is dictum, to say the least, it is forceful and to our opinion sound and most reasonable.

The legislative powers were delegated to the city to be carried out within reasonable limits. The city had power to protect its rights or act to conserve the real duty it owed to the contractor, and it is impossible to conceive how the enlargement of the time specified in the original ordinance to ten days, was an unreasonable extension of time, or could have made a serious difference to any party in interest.

The law is made for practical uses, and indulges in no metaphysical subtleties, and ought not to permit a wrong to be done where it lies in its power to do justice by the exercise of good sense and morals. *Lex non exacte definit, sed arbitrio boni viri permittit*, and *cujus est instituere, ejus est abrogare*, are maxims the court should thoroughly understand.

It is the ability to handle the fundamental rules of construction which enables a man to become a great lawyer or a great judge, and in the principal case there is no evidence of the exercise of this kind of ability.

NOTES OF IMPORTANT DECISIONS

APPEAL IN CHINESE EXCLUSION CASES—HEARING DE NOVO.—The recent case of *Lin Hop Fong v. United States*, 28 Sup. Ct. Rep. 576, decides that in Chinese exclusion cases, where the defendant is ordered deported by the commissioner, and appeals to the district court that he is entitled to a trial de novo. After citing sec. 13 of the Act of 1888 (25 Stat. at L. 476, chap. 1015, U. S. Comp. Stat. 1901, p. 1312), providing for an appeal, the court says:

"In this case the Chinaman did prosecute his appeal from the commissioner to the district judge. The statute is curiously silent as to how the appeal is to be heard; it says nothing as to what papers are to be filed or as to what testimony shall be given. In our view, giving the Chinaman an appeal, the law contemplates that he shall be given the right of a hearing de novo before the district judge before he is ordered to be deported. It is a serious thing to arrest a Chinaman who, as in this case, has been in this country a number of years, lawfully admitted upon a certificate complying with the treaty, and order his deportation without giving him a full opportunity to assert his rights before a competent court. There being no provision of the statute that the hearing shall be upon a transcript of the proceedings before the commissioner, we think, when a party demands it, Congress intends he shall have the right to a hearing and judicial determination before a district judge."

As to the evidentiary value of the certificate, the court comments as follows: "When this young man entered a port of the United States in July, 1899, he presented such a certificate, duly issued and vided by the consular representative of the United States. Upon application for admission this certificate is prima facie evidence of the facts set forth therein. 22 Stat. at L. 58, § 6, chap. 126, U. S. Comp. Stat. 1901, p. 1307; 33 Stat. at L. 428, chap. 1630. This certificate is the method which the two countries contracted in the treaty should establish a right of admission of students and others of the excepted class, into the United States, and certainly it ought to be entitled to some weight in determining the rights of the one thus admitted. While this certificate may be overcome by proper evidence, and may not have the effect of a judicial determination, yet, being made in conformity to the treaty, and upon it the Chinaman having been duly admitted to a residence in this country, he cannot be deported, as in this case, because of wrongfully entering the

United States upon a fraudulent certificate, unless there is some competent evidence to overcome the legal effect of the certificate. In this record we can find no competent testimony which would overcome such legal effect of the certificate, and the plaintiff in error was therefore wrongfully ordered to be deported."

Under such a decision, a Chinese charged with being unlawfully within the country is assured of a fair and impartial hearing before he can be deported.

THE MALICIOUS USE OF ONE'S PROPERTY.

England and the United States stand practically alone in holding that as a general rule a person has an absolute right to use his property as he desires, that he may use it for the purpose of injuring his neighbor, though his motive be solely one of malevolence.

The fact that the Roman law, as well as the law of nearly every nation, is opposed to such a principle, should alone suffice to make a prima facie case against its soundness. It is the purpose of this article to show that, in fact, the doctrine is based neither on authority nor reason, and to point out the justification for a change.

Although the authorities are not abundant, it is generally conceded that the malicious use of one's property for the sole or principal purpose of injuring another was prohibited by the civil law.¹ Such authorities as we have, deal principally with water rights, but the general rule also finds support.² In Germany the doctrine that obtains there is thus expressed: "The exercise of a right is not rendered unlawful by the fact that another is damaged thereby; it is only unlawful to exercise a right solely in order to injure another."³ In Scotland, "The law interpos-

(1) The word "malicious" is used in this connection with a full appreciation of the objections that have been made against it, but because of the inability to find another word that will convey the meaning intended.

(2) Domat, sec. 1047.

(3) Windscheid, Pandektenrecht, vol. 1, sec. 121, 4th ed. .

es so far for the public that it suffers no person to use his property wantonly to his neighbor's prejudice."⁴ In France the same rule exists.⁵

In England, on the other hand, the principle has gradually grown up, in accordance with the maxim, *cujus est solum ejus est usque ad coelum et ad inferos*, and in disregard of the restricting maxim, *sic utere tuo ut alienum non laedas*, that where a person is dealing with his own property he may act as maliciously as he desires towards his neighbor, who has no redress.

The doctrine is based on the idea that since a person has an absolute right to deal with his property as he desire, the motive with which he acts cannot affect that right. The fallacy of the doctrine lies in the idea that exists in regard to the nature of the so-called "absolute rights" of man. Though the statement may at first glance appear radical, it is suggested that properly speaking, there is no such thing as an "absolute right!" Blackstone makes the classic distinction between the rights of this character, as those pertaining to one's personal liberty, his personal security and his property. Though the phrase is a clumsy one, a more accurate statement would be that the rights mentioned are *prima facie* absolute rights. Thus in the case of the right to personal security a person makes out a case by simply stating that he has been injured by another. But the latter may answer that the injury was inflicted in self-defense. Again in the case of the restriction of one's personal liberty by arrest, the question being brought up by *habeas corpus*, the justification may be that the complainant is being detained for a violation of the law of the land.

It is thus evident that in these two cases the so-called absolute rights are not, strictly speaking, absolute, but limited by reason of a person's relations to his fellows, directly and indirectly, through the necessity of

obedience to the laws of the government under which he lives. Likewise in the case of property the rule should be that a person has a *prima facie* right to deal with his own property as he desires, but that this right is limited by the correlative rights of his neighbors. "Property in land must be considered for many purposes, not as an absolute unrestricted dominion, but as an aggregation of qualified privileges, the limits of which are prescribed by the equality of rights and the correlation of rights and obligations necessary for the highest enjoyment of land by the entire community of proprietors. The proposition that soil is property conveys a very imperfect idea of the numerous and variously limited rights comprised in landed estates."⁶

Besides this common reason for the doctrine under consideration, that a man's right to his property is absolute, and hence he may use it as he desires, it is often alleged that it would be impracticable to require the courts to fathom a man's mind and to determine his motive in doing a certain work in connection with his property. But the law does attempt it in certain of its other branches, as in the case of malicious prosecution, and with a reasonable degree of success. It is alleged in reply⁷ that the effect of the malice is but to overturn a permission, and that in this class of cases no right is involved. This answer does not, however, affect the main question, that the law in such a case looks to the motive of an actor. Moreover, where the courts have been required to look into the question of malice to ascertain the motive with which property rights have been exercised in a particular case, no serious difficulty has been met with. Thus in Connecticut the simple rule has been laid down that the "malicious intent must be so predominating as a motive as to give character to the structure. It must be so manifest and positive that the real usefulness of

(4) Erskine, Inst. Book 2, tit. 1, sec. 2.

(5) See cases cited by Prof. Ames in 18 Harv. L. R. 411.

(6) Thompson v. Androscoggin, 54 N. H. 545.

(7) Bigelow, Torts, 7th ed., sec. 41.

the structure will be as manifestly subordinate and incidental."⁸ This case involved the constitutionality of a statute prohibiting malicious structures).

Finally, it should be constantly borne in mind that the courts have no right to refuse to mete out justice because of the difficulties to be met with in so doing. Yet this seems to have been an important factor in retarding the application of this doctrine by the courts.⁹

Historically, also, the generally accepted doctrine is unjustifiable. The leading case in early English law dealing with the subject is *Keeble v. Hickeringill*.¹⁰ The plaintiff complained that he was possessed of a decoy pond to which wild fowl used to resort; that the defendant for the sole purpose of injuring the plaintiff, had discharged firearms near the plaintiff's pond, and had thereby frightened away the fowl from the pond. Judgment was given for the plaintiff. Said Chief Justice Holt: "Now, there are two sorts of acts for doing damage to a man's employment for which an action lies; the one is in respect to a man's privilege, the other is in respect to his property. Where a violent or malicious act is done to a man's occupation, profession or way of getting a livelihood, there an action lies in all cases." The principle could hardly be more plainly stated. Moreover, said the Chief Justice, such principle, though "new in its instance, is not new in the reason or principle of it."

But by reason of the stress that gradually came to be put upon the supposed inviolability of the "absolute rights" connected with land, in addition to the supposed difficulty of determining when malice was the actuating factor in an act, the courts soon lost sight of the principle laid down in this important case, and steadfastly refused to allow an action where an injury was sustained by reason of the malicious exercise by another of his proper-

ty rights. Another factor in determining the courts not to allow a right of action under such circumstances, was their traditional conservatism in not departing from the old and time-honored forms of writs. Even for negligence and fraud there was for a long time no remedy on this account.

Though the English courts refused to accept the new doctrine, they, nevertheless, in the case of water rights, have accomplished practically the same result by insisting that the use of such right must be reasonable.¹¹ It should be said, however, that even as regards water rights, the courts refuse to apply the doctrine in the case of percolating waters.

When the case of *Allen v. Flood* was decided,¹² it was thought that the question of the position of malice in the law had been definitely settled, and that no further claim would be made that it should be regarded. But later cases, though affecting not to interfere with the prior ruling on this particular point, have, nevertheless, shown that the end has not yet come.¹³ In other branches of the law, particularly in the case of rights connected with business, motive is coming to be looked at much more closely than formerly, and it is possible that even in regard to other forms of property, the rule may yet be broadened.¹⁴

In the United States the courts at the outset showed the same tendency to uphold as legal all acts concerned with or relating to the use of one's own land, and to absolutely disregard the question of motive. It is true that in the early case of *Greenleaf v. Francis*,¹⁵ the court stated that the right of the defendant over his own property "should not be exercised from mere malice." But in the subsequent case in the same state of *Walker v. Cronin*, in which the general rule was laid down that "The intentional causing of loss to another with-

(11) *Acton v. Blundell*, 12 M. & W. 324; *Chasemore v. Richards*, 5 H. & N. 990.

(12) 1898 A. C. 1.

(13) *Quinn v. Leathem*, 1901, A. C. 507.

(14) *Pollock on Torts*, 7th ed., 319.

(15) 18 Pick. 117.

(8) *Gallagher v. Dodge*, 48 Conn. 387.

(9) *Chase v. Silverstone*, 62 Me. 175.

(10) 11 East, 574 n.

out justifiable cause, and with the malicious purpose to inflict it, is of itself a wrong," the court considered the case of *Greenleaf v. Francis*, and said: "It is intimated in this case that such acts might be actionable if done maliciously. But the rights of the owner of land being absolute therein, and the adjoining proprietor having no legal right to such a supply of water from lands of another, the superior right must prevail. Accordingly it is generally held that no action will lie against one for acts done upon his own land in the exercise of his rights of ownership, whatever the motive, without violating any legal right; that is, the motive in such cases is immaterial."¹⁶ But the dictum in *Greenleaf v. Francis* was followed in the Pennsylvania case of *Wheatley v. Baugh*.¹⁷ The court there made the sweeping statement that, "neither the civil nor the common law permits a man to be deprived of a well or spring or stream of water for the mere gratification of malice." This statement, as has been seen, is too broad. *Greenleaf v. Francis*, was relied on in a Vermont case decided a few years later,¹⁸ but the court refused to follow it, holding that the statement there made was mere obiter dictum. It was also stated that "It may be laid down as a position not to be controverted that an act legal in itself, violating no right, cannot be made actionable on the ground of the motive which induced it." It is noteworthy, however, that in a sub-jury desired by the defendant. The court gave judgment for the defendant, on the ground that, "for aught that appeared in the declaration, the hole may have been dug for some useful or ornamental purpose, and may also have embraced in its object the malicious design to injure the plaintiff." But the court went on to say that "the act done, to-wit, the using of one's own property being lawful in itself, sequent case decided in the same state the

court emphasized the absence of any allegation of malice in connection with the action of the defendant complained of.¹⁹

In a New York case decided in 1812,²⁰ the unqualified statement was made that "In the exercise of a lawful right a party may become liable to an action when it appears that the act was done maliciously." The courts of that state afterwards, as we shall see, showed a strange inconsistency in dealing with this doctrine.

In Ohio the point was early raised and considered. The plaintiff alleged that the defendant for the sole purpose of injuring him, and to destroy his spring, had maliciously dug a hole on the defendant's own land, which action resulted in the injury to the plaintiff with which it is done, whatever it may be as a matter of conscience, is, in law, a matter of indifference."

The American cases thus far cited related only to water rights. The doctrine was, however, applied in other directions. In 1835 an action was brought in New York for the erection of a spite fence, which cut off the plaintiff's light. A verdict was rendered for the defendant, on the ground that "the plaintiff in this case has only been refused the use of that which did not belong to her, and whether the motives of the defendant were good or bad, she has no legal cause of complaint."²¹ No reference was made to the earlier case of *Panton v. Holland*. In a subsequent New York case the additional reason was given of the impracticability of a contrary doctrine.²² "A different rule would lead to the encouragement of litigation, and prevent, in many instances, a complete and full enjoyment of the right of property which inheres to the owner of the soil. Malice might easily be inferred sometimes from idle and loose declarations, and a wide door would be opened by such evi-

(19) *Harewood v. Benton*, 32 Vt. 737.

(20) *Panton v. Holland*, 17 Johns. 92, 8 Am. Dec. 369.

(21) *Mahan v. Brown*, 13 Wend. 261, 28 Am. Dec. 461.

(22) *Phelps v. Nowlen*, 72 N. Y. 39, 28 Am. Rep. 93.

(16) 107 Mass. 555. Also cf. *Plant v. Woods*, 176 Mass. 492.

(17) 25 Penn. St. 528.

(18) *Chatfield v. Wilson*, 28 Vt. 49.

dence to deprive an owner of what the law regards as well defined rights."

In view of the injury that could be inflicted under such a rule, we soon find some of the courts attempting to place a limitation on the doctrine. Mr. Washburn, in an early edition of his work on Easements, speaking of the right of a person to have his well protected against injury inflicted maliciously, makes the following tentative statement: "It would, therefore, seem to constitute a something of which *meum* and *tuum* might be predicated, and in regard to which the maxim *sic utere tuo ut alienum non laedas*, would not be wholly foreign, especially when the party destroying it does it by using his own property, not for his own benefit, but for the purpose of depriving his neighbor of what he would otherwise have rightfully enjoyed."²³ But Mr. Washburn was apparently unable to see any logical basis for such a doctrine, as we find him saying in another place, "If one has a legal right to do certain acts in regard to his own property, it is difficult to imagine how he should forfeit those rights by doing them from an unfriendly motive toward the person who is affected by them."²⁴ But as was said in the comparatively recent case of *Horan v. Byrnes*,²⁵ "As applied to the use of real estate, this argument begs the question, which is whether the enjoyment of real estate includes the right to use it solely to injure another. Because when employed for a useful purpose, such use may rightfully injure another, it does not follow that the same use for a wrongful purpose may also rightfully injure another, except upon the theory of absolute dominion, because the character of the use is an element of the right."

Mr. Cooley refused to venture so far as Mr. Washburn. His only concession is that "It may be that if one shall assert his rights with no other object than annoyance, he should be put to the observance

of a higher degree of care than if what he was doing had in view a beneficial purpose."²⁶ There seems to be no justification for such a restriction.

The dissatisfaction with the old doctrine culminated in Massachusetts in a statute passed in 1887, prohibiting the malicious erection and maintenance of any structure in the nature of a fence unnecessarily exceeding six feet in height, erected for the purpose of annoying the owners or occupants of adjoining property, on the ground of its constituting a private nuisance.²⁷ The objection was raised that the statute was unconstitutional. It was, however, upheld on the ground of its being a valid exercise of the police power. Mr. Justice Holmes conceded that "the legislature would not have power to prohibit putting up or maintaining stores or houses with malicious intent." That although the difference was only one of degree, that "difference of degree is one of the distinctions by which the right to exercise the police power is determined."²⁸ It is true that such a restriction is proper if the justification for the condemnation is to be placed in the exercise of the police power. But if it could be shown that even a building were erected primarily out of malice, there could be no logical objection to having its maintenance declared incompatible with another's correlative right to the enjoyment of light and air. The main difficulty would lie in proving that malice was the primary motive in connection with its construction and maintenance. The test laid down in this Massachusetts case would be a proper one, "It is not enough to satisfy the words of the act that malevolence was one of the motives, but the malevolence must be the dominant motive, a motive without which the fence would not have been built or maintained."

About this same time the same question

(23) *Easements*, 3rd ed. 492.

(24) *Supra*, p. 475.

(25) 72 N. H. 93, 62 L. R. A. 602.

(26) *Cooley on Torts*, 2nd ed., p. 693.

(27) Stat. 1887, ch. 348.

(28) *Rideout v. Knox*, 148 Mass. 368, 2 L. R. A. 81.

arose in Michigan, where it was met without the aid of a statute. There, by an equally divided court, the decision of the lower court holding that the erection of screens by the defendant on his own premises for the sole purpose of cutting off the plaintiff's light and air constituted a nuisance.²⁹ The opinion of the justice who rendered the decision sustaining the lower court cannot, however, be considered a masterpiece of logic. The ruling has been followed in subsequent cases in the same state.³⁰

In most of the states in which the question first arose, it was held that there could be no right of action for an injury sustained in this manner. As a consequence, a number of them have passed statutes prohibiting the erection of structures whose primary purpose is one of malevolence.³¹

Even conceding that the common law of England does not justify any interference with structures erected on a man's own land, no matter what his motive may be, it does not follow that we are left without other redress than furnished by a statute. It has been shown that the permission of such malevolent actions is not in accord with the ideas of justice existing in practically all modern nations. It can have no justification other than technical rules relating to property rights, having no basis in reason or common fairness. What, then, should interfere with its being discarded. Though the common law is generally held to be in force throughout the United States, except when superseded by statute, there is scarcely a state in the union that has not decided that only that portion that is applicable to our needs and suited to our circumstances was so adopted. Thus it was early held that the English doctrine in regard to ancient lights was not suited to this country, and accord-

ingly repudiated. As was said by Chief Justice Lowrie of the Supreme Court of Pennsylvania, "Common law grows out of the customs of the country, and consists of definitions of those customs and those ancillary principles that naturally accompany them, or are deducted from them. The common law of one country or century is not necessarily the common law of another, because customs change."³²

Hence in view of the gradual change that has come about in the feelings of the people, that no person should be allowed to injure his neighbor merely to gratify his spite, there seems to be no objection to repudiating the old doctrine in those states that have not already committed themselves. The new principle would certainly meet with approval. It is only the conservatism of our courts that has kept it in existence up to the present time. It is true that it might be often difficult to determine what is the actuating motive in the mind of a person in erecting a structure or doing some work on his premises. But as has been seen, a satisfactory and easily applied test has been formulated. Moreover, as was stated before, the mere difficulty to be met with in meting out justice in a particular case should not deter a court from undertaking it.

ROBT. L. McWILLIAMS.

Spokane, Wash.

(32) *Eminger v. Lewis*, 32 Pa. St. 367.

BILLS AND NOTES—NOTICE TO TRANSFEREE—CORPORATE PAPER—TRANSFER BY OFFICER.

WARD v. CITY TRUST CO. OF NEW YORK.

Court of Appeals of New York, April 14, 1908.

Where a bank in making a loan to a corporation delivered to the corporation's president a cashier's check payable to the corporation, which the president indorsed in his official capacity, and delivered to a trust company in payment of an individual loan made to himself and another, the form of the check was notice to the trust company that the president of the corporation was using corporate property to pay

(29) *Burke v. Smith*, 69 Mich. 380.

(30) *Flaherty v. Moran*, 81 Mich. 52, 21 Am. St. Rep. 510; *Kirkwood v. Finnegan*, 95 Mich. 543, 55 N. W. Rep. 457.

(31) e. g., Mass., Wash., Me., Vt., N. H., Calif.

his personal debt in apparent violation of its rights, the effect of which notice was to put the trust company on inquiry to determine whether the president of the corporation was authorized so to use its funds both as against a corporation and its creditors.

Where a cashier's check tendered in payment of a debt was sufficient on its face to excite suspicion as to the right of the payer to so use the check, the creditor in accepting the check without inquiry was still entitled to the rights of a bona fide purchaser, if reasonable inquiry would have led to the knowledge of facts which would have dispelled the presumption of illegal use, but was also chargeable with knowledge of such unfavorable facts as reasonable inquiry would have discovered in relation to the defect that made the inquiry necessary.

A corporation even by joint action of all its officers, directors and stockholders cannot authorize the voluntary application of the corporation's assets to the individual debts of its officers to the prejudice of creditors of the corporation.

VANN, J.: In March, 1901, Frank A. Umsted, but recently a salesman in the employ of the Hartman Manufacturing Company, a Pennsylvania corporation, and William L. Kiefer, a lawyer, borrowed \$125,000 of the defendant the City Trust Company, a New York corporation, in their own names, and for their own benefit. They had previously arranged to purchase the entire capital stock of the Hartman Company of the face value of \$250,000 for \$110,000, and they used enough of the proceeds of the loan to pay for such stock, which they pledged as collateral to their promissory note given to secure the loan. The trust company knew that the bulk of the money, was to be used to pay for the stock, although it believed that the purchase price was much larger. The interest reserved was at the rate of 14 per cent, a year, and a commission of over \$5,000 was paid in addition. As a condition of the loan, which was procured by misrepresentation and fraud on the part of Umsted and Kiefer, Chapman, a director, and Plummer, a representative of the trust company, were elected directors of the Hartman Company to look after the interests of the former until the loan should be paid. At the same time Umsted was elected president and Kiefer secretary and treasurer. No part of the proceeds of the loan was turned over to the Hartman Company, or used for its benefit, nor was any representation made that it was procured, or was to be used in its behalf. The period of credit was six months, and about 60 days before it expired Umsted and Kiefer applied to the trust company for another loan, which was refused, but consent was given to the payment of the note before maturity. Thereupon Umsted, on the 2d of August, 1901, falsely rep-

resenting that the loan from the City Trust Company for \$125,000 "had been made for the Hartman Company," procured a loan for the latter from the Hanover Bank for \$200,000, which was secured by the promissory note of the Hartman Company, indorsed by Umsted and Kiefer, and the certificates of all the stock of the Hartman Company were pledged as collateral. In paying over the proceeds of that loan the Hanover Bank delivered to Umsted, at his request, to enable him to pay the loan to the trust company and redeem the certificates of stock, its check for \$125,000, payable to the order of the Hartman Manufacturing Company, and placed the balance of \$75,000 to the credit of that company on its books. Umsted indorsed the check in the name of the Hartman Manufacturing Company by himself as president and general manager, and delivered it to the City Trust Company in payment of the note made by himself and Kiefer. The Hartman Company received no consideration for the use made by Umsted of said check. The note as well as the certificates of stock pledged as collateral thereto were surrendered to Umsted. The money lent was out of the possession of the trust company only from March 27th until August 2d, so that the interest actually received was at the rate of more than 20 per cent per annum. At the time of this transaction Umsted, as president of the Hartman Company, had been authorized by a resolution of the board of directors "to take charge of all the property and business of the company" and to make and sign "all checks, notes, contracts, and other obligations of the corporation." After adopting said resolution the directors held no further meetings until after all rights involved in this action had become fixed and unchangeable. Umsted transacted all the business of the company. There was no by-law of the Hartman Company, nor any resolution of its board of directors, authorizing the use of its money or assets to pay other than corporate obligations, or ratifying the use made of said check. Between three and four months after the check had been so used the Hartman Company failed, and all its property, except its alleged right to recover from the City Trust Company said sum of \$125,000, was sold at the instance of a reorganization committee composed of creditors, and the proceeds, amounting to \$238,000, applied proportionately upon its debts, leaving still unpaid the sum of \$371,140.29. The remaining claims of the various creditors were assigned to the plaintiff, who recovered judgment against the Hartman company for the amount thereof, and an execution issued thereon was returned unsatisfied. Said judgment is wholly unpaid. Of that indebtedness the sum of \$226-

840.62 was in existence on the 2d of August, 1901, and prior to the date of the withdrawal from the assets of the Hartman Manufacturing Company of said sum of \$125,000 used to pay the debt of Umsted and Kiefer to the City Trust Company for that amount. That withdrawal made the Hartman Company insolvent, and the object of this action was to recover from the trust company the sum thus misappropriated.

The referee before whom the action was tried, after finding the foregoing facts in substance, further found that the trust company acted in good faith, with no intent to hinder, delay, or defraud the creditors of the Hartman Company; that the form of the cashier's check was notice to the trust company that the money represented thereby was the property of the Hartman Company; that the trust company, knowing that Umsted and Kiefer owned all the capital stock of the Hartman Company, and believing that they were authorized to dispose of said check, made no inquiry as to the authority of Umsted as president and general manager to use the same in payment of the individual debt of himself and Kiefer, or as to the financial condition of the Hartman Company, or whether the effect of the withdrawal of \$125,000 from its assets would make it insolvent; that if reasonable inquiry had been made it would have disclosed the said resolution of the board of directors; that no meeting of the board had since been held, and that Umsted, after the passage thereof, had had the exclusive control of the business of the company. It was also found that the law of Pennsylvania is the same as the law of New York in the respect that the amount of the assets of a corporation over and above its liabilities are in equity a trust fund held by the corporation for the benefit of creditors; that so far as the rights of creditors are concerned in this case there is no difference between the law of New York and the law of Pennsylvania; and that by the law of the latter state the directors of an insolvent corporation may authorize a sale of all or any of its assets without authority from the stockholders thereof. The referee found as conclusions of law that the trust company was a bona fide holder for value of said check for \$125,000; that it obtained a good title thereto as against the Hartman Company and its creditors; and that the plaintiff is not estopped to maintain this action by the use made by the reorganization committee of the certificates of capital stock of the Hartman Company. The complaint was dismissed on the merits, with costs.

Upon appeal to the Appellate Division the judgment was affirmed by a divided vote upon the opinion of the referee, which, together with the dissenting opinion of Mr. Justice

Scott, concurred in by Mr. Justice McLaughlin, may be found reported in 117 App. Div. 130, 102 N. Y. Supp. 50. Reference is made to these opinions for a more detailed statement of the facts, which were fully found and clearly stated.

The main question presented for decision is whether the facts found, when all are considered together, support the conclusions of law. The form of the check in question was notice to the trust company that Umsted was using the property of the corporation of which he was president to pay the personal debt of himself and Kiefer in apparent violation of its rights. *Rochester & Charlotte Turnpike Road Company v. Paviour*, 164 N. Y. 281, 58 N. E. Rep. 114, 52 L. R. A. 790; *Gerard v. McCormick*, 130 N. Y. 261, 29 N. E. Rep. 115, 14 L. R. A. 234; *Hathaway v. County of Delaware*, 185 N. Y. 368, 372, 78 N. E. Rep. 153, 113 Am. St. Rep. 509. The effect of such notice was to put the trust company upon inquiry to see whether it was about to accept money from one to whom it did not belong in payment of its own claim. The presumption arising from the face of the check was that it belonged to the Hartman Company, and that its president had no right to use it to pay his personal debt. The purpose of the law in exacting inquiry under such circumstances is to see whether the apparent situation is the actual situation, or, in other words, to learn whether facts exist to rebut the presumption. The object is not to discover negative facts, or such as would not arouse suspicion, but positive facts, which would allay the suspicion already aroused. If, for instance, reasonable inquiry had been made by the trust company, and the result had tended to show that the check really belonged to Umsted and Kiefer and not to the Hartman Company, or that Umsted was authorized by the company to use it as he proposed, then, even if the fact were otherwise, such inquiry would have tended to rebut the presumption of illegal use, and to protect the title of the trust company. The law goes further than this in order to promote the transfer of commercial paper, for it is settled that if no inquiry is in fact made to dispel the presumption, but reasonable inquiry would have led to the discovery of facts which would have dispelled it, the purchaser of the paper is entitled to the benefit thereof the same as if he had learned them by proper investigation. *Wilson v. Metropolitan Elev. Ry. Co.*, 120 N. Y. 145, 153, 24 N. E. Rep. 384, 17 Am. St. Rep. 625. This benefit, however, carried with it the burden of responsibility for such unfavorable facts as reasonable inquiry would have discovered in relation to the defect that made the inquiry necessary. *Cohnfeld v. Tanenbaum*, 176 N. Y. 126, 130, 68 N. E. Rep. 141, 98 Am. St. Rep. 653; *Rochester & Charlotte Turnpike Road Co. v. Paviour*, 164 N. Y. 281, 286,

58 N. E. Rep. 114, 52 L. R. A. 790; *Seger v. Farmers' Loan & Trust Co.*, 187 N. Y. 314, 219, 79 N. E. Rep. 977. In the case before us no inquiry was made, although the check was for so large an amount as to induce a prudent man to proceed with caution. The transaction upon its face involved a gift to Umsted and Kiefer, or the theft by them, of a large portion of the assets of the Hartman Company, and under such extraordinary circumstances reasonable inquiry meant one prosecuted with a degree of intelligence adapted to those circumstances. Inquiry of Umsted and Kiefer would not have satisfied the requirement, for it was apparent that they were acting in their own interest, and hence beyond the general scope of their authority. *Bank of New York Banking Association v. American Dock & Trust Co.*, 143 N. Y. 559, 564, 38 N. E. Rep. 713. The trust company had ample opportunity to learn all the facts, for it had representatives on the board of directors of the Hartman Company, the apparent owner of the check. According to the custom of business men, and especially of banks, the first inquiry would have called for a resolution of the board of directors authorizing Umsted to use the check to pay his own debts. The minute book of the board was open to examination by the representatives of the trust company, but when examined it would have shown no such authority, for the resolution relied upon, broad as it was, simply authorized Umsted as president to take charge of the property and business of the company, and to sign checks, notes, and other obligations in its behalf. This meant that he could do these acts only in transacting the business of the company, for no other construction would be reasonable. There was no suggestion of permission to give away the assets of the company, or to use them to pay the personal debts of its officers. Such dangerous power, which might involve ruin of the company, cannot be conferred unless the intention is expressed with the utmost clearness. "If such a power is intended to be given, it must be expressed in language so plain that no other interpretation can rationally be given it, for it is against the general law of reason that an agent should be intrusted with power to act for his principal and for himself at the same time." *Bank of New York Nat. Banking Ass'n v. Am. Dock & Trust Co.*, 143 N. Y. 559, 564, 38 N. E. Rep. 713, 714.

The next inquiry would naturally have been whether Umsted had implied authority, to be inferred from similar acts and past conduct known to the directors of the corporation, and not objected to by them, but that inquiry would have disclosed nothing to rebut the presumption. There is no evidence that Umsted, before misappropriation of the check in question, had ever used the property

of the corporation he represented to pay his own debts or otherwise than in the transaction of its business. No fact of any kind would have been discovered, because none existed, to show authority, express or implied, and the presumption would therefore have stood in full force. While inquiry would have discovered that Umsted had full power to act for the corporation in all its corporate business, it would not have shown that he had the right, either real or apparent, to use the check in question in payment of the debt owing by himself and Kiefer to the trust company. If an officer of that company "had made the inquiry, he would have learned the facts already stated. He is therefore chargeable with all that these facts import, or which is fairly to be inferred from them." *Cohnfeld v. Tanenbaum*, 176 N. Y. 126, 130, 68 N. E. Rep. 141, 98 Am. St. Rep. 563. If the check had been regular on its face, that is, if it appeared to have passed through the hands of the Hartman Company, and thence into the channels of commerce, as in a case relied upon by the respondent, then, even if offered in payment of his personal debt by one of the officers of the company, the taker without notice would have the right to assume that the relations of the various parties to the paper were what they appeared to be. *Cheever v. Pittsburgh, Shenango & Lake Erie R. R. Co.*, 150 N. Y. 59, 66, 44 N. E. Rep. 701, 34 L. R. A. 69, 55 Am. St. Rep. 646. The case before us, however, is utterly different, for the check showed on its face that it did not belong to Umsted and Kiefer, but to the Hartman Company. As was said in the *Pavlour Case*, *supra*: "There was a shadow on the checks, and the defendant could not, in good faith, accept them until it disappeared. By accepting them he did an act which he had reason to believe would affect the rights of a third party, and he could not, in justice to that party, ignore the suspicions which the facts should have aroused. One who suspects, or ought to suspect, is bound to inquire, and the law presumes that he knows whatever proper inquiry would disclose. While the courts are careful to guard the interests of commerce by protecting the negotiation of commercial paper, they are also careful to guard against fraud by defeating titles taken in bad faith, or with knowledge, actual or imputed, which amounts to bad faith, when regarded from a commercial standpoint." According to the facts found by the referee, when all are read together, we think that proper inquiry by the trust company or its officers would not have shown that Umsted possessed the authority which he assumed to exercise, but, on the contrary, that he had no such authority, either expressed or implied.

Thus far we have confined the discussion to the rights of the Hartman Company, and

to the authority or want of authority of its president to use the check for his own benefit. The rights of creditors, however, were also involved, for the Hartman Company was insolvent, yet the transaction on its face indicated a gift by that company to Umsted and Kiefer of \$125,000, or precisely one-half of its capital as it stood at the time. While Umsted and Kiefer owned all the stock, and Kiefer ratified whatever Umsted did, still the rights of creditors remained, even if the corporation and its stockholders were ready to give away every right within their power. *Hurd v. N. Y. & Com'l Steam Laundry Co.*, 167 N. Y. 89, 95, 60 N. E. Rep. 327; *Cole v. Millerton Iron Co.*, 133 N. Y. 164, 168, 30 N. E. Rep. 847, 28 Am. St. Rep. 615. It was not enough for the trust company to part with value by surrendering the note and collateral, for it was bound to act in good faith in order to get good title. Negotiable Instruments Law, Sections 91, 94, 95, Laws 189/, p. 732, c. 612. Bad faith in taking commercial paper does not necessarily involve furtive motives, for it exists when the purchaser has notice of facts which, if unexplained, would show that he was taking the property of one who, to quote again from Pavlour case, "owed him nothing, in payment of a claim that he held against some one else. * * * Even if his actual good faith is not questioned, if the facts shown to him should have led him to inquire, and by inquiry he would have discovered the real situation, in a commercial sense he acted in bad faith, and the law will withhold from him the protection that it would otherwise extend." The trust company had notice that apparently it was dealing with a donee, who had no title to the check as against creditors or with a thief, who had no title as against any one. It knew the Hartman Company was a heavy borrower, and that there were creditors with large claims. It knew the enormous rate of interest that these men had promised to pay when they secured the loan, as well as the payment by them of about \$5,000 in addition as a commission to Plummer, its representative, who aided the borrowers in procuring the loan. It knew through Chapman and Plummer, with whose knowledge it was charged, that the company was heavily involved. The presumption was against the transaction, and, as we have seen, unless that presumption was overcome by reasonable inquiry, the transaction, unlawful in fact, and unlawful on its face, is presumed to have been known to the trust company to be unlawful. The duty of inquiry extended to all the facts and defects suggested by the form of the check, and hence went beyond the question of authority and included the rights of creditors. As was well said in the dissenting opinion below, to which we are greatly indebted: "Pri-

marily, the capital of a corporation is held for the protection of its creditors, and is impressed with a trust in their behalf, and the directors cannot lawfully, nor can the stockholders, divert the funds of a corporation to the individual use of its members, if thereby the capital is impaired and the corporation rendered insolvent." *Hurd v. N. Y. & Com'l Steam Laundry Co.*, 167 N. Y. 89, 60 N. E. Rep. 327; *Germania Safety Vault & Trust Co. v. Boynton*, 71 Fed. Rep. 797, 19 C. C. A. 118; *Matter of Prospect Worsted Mills* (D. C.) 126 Fed. Rep. 1011; *National Trust Co. v. Miller*, 33 N. J. Eq. 155. To these carefully selected authorities cited by Mr. Justice Scott there may properly be added the pioneer case in this state—*Bartlett v. Drew*, 57 N. Y. 587. The trust company was charged with knowledge of the law that a corporation, even with the consent of all its stockholders, cannot give away its property, provided there is not enough left to pay its debts. The form of the check and its amount when compared with that of the capital stock required investigation or inquiry as to the solvency of the company. That inquiry, honestly and diligently made, would have shown that the Hartman Company was insolvent, or would become so, by the withdrawal of so large a part of its capital as the check represented. Even if, as the learned referee held, although erroneously, as we think, the trust company had the right to assume that Umsted and Kiefer, as the sole owners of the stock, could lawfully use the assets of the corporation for their own purposes, still the assumption would necessarily be limited to the corporation itself. It could not extend to creditors whose rights are supreme, and which cannot be sacrificed even by the joint action of all the officers, directors, and stockholders of the corporation. We do not need to consider the rights of "future creditors," for the claims of "existing creditors" exceed in amount the sum misappropriated.

The learned counsel for the respondent contends that the plaintiff, although a creditor, armed with judgment recovered and execution unsatisfied, is not entitled to maintain this action because the creditors, who are his assignors, used new stock of the Hartman Company, issued in place of that surrendered to Umsted, to reorganize that corporation and another, the capital stock of which it had purchased. This contention was properly overruled by the referee, and we adopt his reasons for such action, which we quote from his opinion: "Nor can I find, as urged by the learned counsel for the defendant, that the subsequent use of the stock is being voted upon for the purpose of an increase of the capital, or its being transferred to a third party for the benefit of the creditors or of the

corporation through the intervention of Mr. Chapman after it was discovered that the corporation was in a bad financial condition, or its subsequent transfer to the receiver of the corporation for its benefit, in any way operates to make this surrender of the stock to Umsted and Kiefer a purchase by the corporation, or to estop in any way the plaintiff from maintaining this action, if otherwise he could maintain it. What was done with the stock after it was delivered to Umsted and Kiefer was done by them as owners, and not in any sense by the corporation. The final surrender of Umsted's interest in the stock seems to have been in consideration of a release of a claim of the creditors against his wife in respect to other property. These questions, however, like many other questions of fact and law that were fully and ably discussed on the trial and summing up of the case, are not material to the disposition of the main issues in the case, as I understand them." The stock that was pledged to secure the note of the City Trust Company, and to redeem which the check for \$125,000 was paid, was not the property of the Hartman Company. The company did not own its own stock, but it was owned by the two stockholders who had borrowed the money from the trust company, and in no respect was it essential to the contemplated increase of the capital stock of the corporation that the pledged stock should be acquired by the Hartman Company or canceled. Hence the surrender of the stock did not inure to the benefit of the Hartman Company in any way.

The finding of fact made by the referee that the trust company acted in good faith, and with no intention to defraud the creditors of the Hartman Company, when considered with his other findings, is consistent therewith, and the appellant is entitled to rely upon those most favorable to himself. *City of Buffalo v. Del., L. & W. R. R. Co.*, 190 N. Y. 84, 98, 82 N. E. Rep. 513.

As thus construed, the facts found do not warrant the conclusion of law that the complaint should be dismissed. We are therefore constrained to reverse the judgment below, and order a new trial, with costs to the appellant to abide event.

Note.—Notice and Inquiry.—The principal case contains a most thorough review of the principle of law applicable, with citation of leading authorities. The case deals with principles of law firmly established, but sometimes difficult of application. One point emphasized especially by the court is that the directors of a corporation are trustees of its assets, for the benefit first of its creditors and then of its stockholders. Therefore, even though all the stockholders agree to the proposed misapplication of the fund, he who takes the assets without giving full consideration to the corporation,

if he has notice, actual or constructive, or if put on inquiry, must look further and see that the transaction is not a fraud on the creditors of the corporation. As is well said, a corporation cannot, even with the consent of all its stockholders, give away its property, if there is not enough left to pay its debts. Trustees in general are held to a very strict account, and the tendency is to hold the directors of a corporation to the same strict accountability as any other trustee, not only as to creditors, but as to non-consenting stockholders. In any other case a trustee would hardly have been permitted to take a check payable to the beneficiary, and apply the amount to his own debt, where the party receiving the check had knowledge as in this case, that such payment was sufficient to nearly wipe out the trust fund.

Where there is anything in the transaction which would indicate to the prudent man that the holder of paper is under some limitations, then inquiry must follow. See 7 Cyc., Commercial Paper, 951, and authorities there cited.

It was held in *Mathis v. Barnes*, 1 Ind. App. 164, 27 N. E. Rep. 308, that one taking an assignment of a note from a guardian which he knows belong to the ward, in payment of the private debt of the guardian, acquires no title.

In *Johnson v. Suburban Realty Co.*, 62 Mo. App. 156, plaintiff purchased a note from an officer of the defendant corporation, the consideration being in part a release of an individual indebtedness of such officer. It was there held, as in the principal case, that the purchaser of the paper having had knowledge that the note belonged to the corporation, was not a purchaser in good faith.

JETSAM AND FLOTSAM.

DANIEL BOONE AS A JUDGE.

The first murder north of the Missouri river recorded in history was committed in December, 1804, and the criminal was indicted by the first grand jury that assembled north of the Missouri river after the cession of the territory to the United States. The preliminary hearing was held before Daniel Boone, who placed the accused in a jail in St. Charles to await the action of the grand jury. When the jury assembled it was found that eleven of the twelve could not sign their names. The one who could sign his name was chosen foreman. The indictment which they framed after great labor was a curious one and of special interest as the first indictment drawn in Louisiana territory under the United States government. It read as follows:

"That one James Davis, late of the district of St. Charles, in the territory of Louisiana, laborer, not having the fear of God before his eyes, but being moved and seduced by the instigation of the devil, on the thirteenth day of December, in the year of our Lord one thousand eight hundred and four (1804), at a place called Femme Osage, in the said district of St. Charles, with force of arms, in and upon William Hays, in the peace of God and the United States, there and then feloniously, wilfully and with malice aforethought, did make an assault and that the same James Davis, with a certain rifle gun, four feet long, and of the value of \$5, then and there loaded with gunpowder and one leaden bullet, with said rifle gun the said James

Davis then and there in his hands had and held, fired and killed William Hays."

A true bill was found against James Davis, and he was bound over to appear for trial. His bail bond was fixed at \$3,000, which Daniel Boone signed. There must have been extenuating circumstances connected with the murder, for Davis was cleared when placed on trial.—Kansas City Star.

HUMOR OF THE LAW.

The coroner's jury had returned its verdict, death by exposure.

"Why," questioned the mourning relative, "how could that be? There were two bullet wounds."

"Just so, exposed to bullets."—Canadian Law Review.

The judge decided that certain evidence was inadmissible. The attorney took strong exception to the ruling and insisted that it was admissible.

"I know, your honor," said he, warmly, "that it is proper evidence. Here I have been practicing at the bar for forty years, and now I want to know if I am a fool?"

"That," quietly replied the court, "is a question of fact, and not of law, so I won't pass any opinion upon it, but will let the jury decide."—Green Bag.

Judge—"You were caught carrying a sackful of jewelry and silverware, and have the audacity to plead not guilty?"

Prisoner—"An annoying mistake, your honor. I am a souvenir collector."—Green Bag.

WEEKLY DIGEST.

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1. **Abatement and Revival—Death of Party.**—Widow prosecuting suit commenced by de-

ceased husband held to have adopted original pleadings, so as to render judgment in her favor sufficient as against objection that there were no pleadings to support it.—Houston & T. C. R. Co. v. Buchanan, Tex., 107 S. W. Rep. 595.

2. **Account Stated—Instructions.**—In an action for agent's commissions, the court properly charged that, if there had been an account stated by the parties for the year 1897, such account could not afterwards be impeached by either party except for fraud or mistake.—Wrought Iron Range Co. v. Young, Ark., 107 S. W. Rep. 674.

3. **Adverse Possession—Color of Title.**—Failure to record a receipt from the sheriff to a tax sale purchaser as expressly required by statute goes to invalidate the deed, but does not affect the color of title afforded by the deed.—Greenleaf v. Bartlett, N. C., 60 S. E. Rep. 419.

4. **Land Within Congressional Grant.**—An attempt to acquire title from the United States under Act March 3, 1887, c. 376, 24 Stat. 556, held not a recognition of superior title in the United States or in railroad company, which can interrupt the continuity of adverse possession.—Missouri Valley Land Co. v. Wiese, U. S. S. C., 28 Sup. Ct. Rep. 299.

5. **Aliens—Statutes.**—Act 1840 of the Republic of Texas (Laws 1840, p. 90), removing the inhibition against the right of aliens to inherit lands within the state, is not retroactive, and has no application to a descent cast prior to the independence of the state.—Webb's Heirs v. Kirby Lumber Co., Tex., 107 S. W. Rep. 581.

6. **Appeal and Error—Error Cured by Subsequent Instructions.**—In an action against a railroad company for injuries to plaintiff through a defective highway crossing, the refusal of a charge as to preponderance of evidence as to damages held not reversible error in view of other charges.—St. Louis, Southwestern Ry. Co. of Texas v. Smith, Tex., 107 S. W. Rep. 638.

7. **Harmless Error.**—Any error in admitting a plat in evidence without proof of its correctness was cured by subsequent proof thereof.—Greenleaf v. Bartlett, N. C., 60 S. E. Rep. 419.

8. **Law of the Case.**—Where, on a former appeal, an instruction on punitive damages was objected to, but was not criticised by the court, the court on a retrial properly submitted it again to the jury.—Louisville & N. R. Co. v. Fowler, Ky., 107 S. W. Rep. 703.

9. **Points Not Raised.**—The invalidity of a statute by reason of a constitutional infirmity, the consideration of which will sustain the judgment, will not be ignored on appeal because of the failure of appellee to assail it in his briefs.—Kraus v. Lehman, Ind., 83 N. E. Rep. 714.

10. **Appearance—Jurisdiction.**—A defendant filing its application for a change of venue in an action within the jurisdiction of the court enters its general appearance in the cause, and gives the court jurisdiction over the person of defendant.—Julian v. Kansas City Star Co., Mo., 107 S. W. Rep. 496.

11. **Arbitration and Award—Performance of Award.**—Where an award required a city to reconstruct a portion of a street in front of plaintiff's premises, it was immaterial that the city performed such work before the award was actually signed.—City of Lexington v. Williamson, Ky., 107 S. W. Rep. 717.

12. **Attorney and Client—Confidential Relation.**—An attorney cannot allow his personal interests to become antagonistic to those of his client without at once giving the client full information thereof.—*Roller v. McGraw*, W. Va., 60 S. E. Rep. 410.

13. **Bail—Forfeiture.**—By failing to appear in person at a preliminary examination, accused forfeited his recognizance for such appearance, though his counsel appeared.—*State v. Rabens*, S. C., 60 S. E. Rep. 442.

14. **Bankruptcy—Chattel Mortgages.**—A chattel mortgage creditor of a bankrupt, who consents to the sale of the property by the trustee in bankruptcy, and files his petition in the bankruptcy court to establish his lien on the proceeds, cannot demand a jury trial.—*In re Standard Telephone & Electric Co.*, U. S. D. C., E. D. Wis., 157 Fed. Rep. 106.

15. **Effect on Executory Contracts.**—Bankruptcy is such an anticipatory breach of a contract to take and pay for stock of a corporation at a stated price and time, which time was subsequent to the bankruptcy, that a claim for damages for the breach is a provable debt.—*In re Neff*, U. S. C. C. of App., Sixth Circuit, 157 Fed. Rep. 57.

16. **Homestead.**—In the absence of a local rule to the contrary, the mere use by an insolvent of non-exempt funds or as assets in acquiring a homestead does not make it subject to the claims of his creditors in bankruptcy.—*In re Letson*, U. S. C. C. of App., Eighth Circuit, 157 Fed. Rep. 78.

17. **Partnership.**—Where a banking firm had agreed with the stockholders of a bank in liquidation to assume its debts and pay its depositors, in proceedings for the discharge of one of the members of the firm in bankruptcy the amount of a deposit made in the bank should be listed in the name of the depositor, and not in the name of the bank.—*Hoskins v. Velasco Nat. Bank*, Tex., 107 S. W. Rep. 598.

18. **Preferences.**—A payment of notes to a bank by an insolvent a few days before his bankruptcy held to have been received under such circumstances as to give the bank reasonable cause to believe that a preference was intended and to constitute a voidable preference.—*Pratt v. Columbia Bank*, U. S. D. C., S. D. N. Y., 157 Fed. Rep. 137.

19. **Boundaries—Rejection of Call.**—A call irreconcilable with another call, which appears to have been inserted by mistake, will be wholly rejected.—*Matheny v. Allen*, W. Va., 60 S. E. Rep. 407.

20. **Brokers—Commissions.**—Where two brokers were employed to sell certain land, the one who actually consummated the sale held entitled to the commissions.—*Edwards v. Pike*, Tex., 107 S. W. Rep. 586.

21. **Carriers—Carriage of Goods.**—The failure of a carrier to deliver property received for transportation held to constitute a cause of action, so that the shipper need not allege or prove the specific misconduct.—*Merritt Creamery Co. v. Atchison, T. & S. F. Ry. Co.*, Mo., 107 S. W. Rep. 462.

22. **Connecting Carriers.**—A connecting carrier held not entitled to refuse to receive a shipment of cattle merely on the ground that the 28-hour feed and rest period had nearly expired.—*Gulf, C. & S. F. Ry. Co. v. Batte*, Tex., 107 S. W. Rep. 632.

23. **Contract of Carriage.**—For a carrier to avail himself of an exception under a special

contract to avoid liability for loss or damage to goods shipped, he must show that such loss or damage came within the exception, and that his own negligence did not contribute to it.—*Atlanta & W. P. R. Co. v. Broome*, Ga., 60 S. E. Rep. 355.

24. **Delay in Freight Shipment.**—In an action to recover damages against a connecting carrier for unreasonable delay in the shipment of apples, evidence held to sustain a verdict for defendant.—*Fain & Stamps v. Southern Ry. Co.*, Ga., 60 S. E. Rep. 359.

25. **Discriminating Rates.**—A connecting carrier taking cars as they are delivered held not liable for discrimination in favor of shippers of oil in tank cars against shippers of oil in barrels, though by Act Feb. 4, 1887, c. 104, sec. 8, 24 Stat. 379, a carrier which causes or permits any act to be done declared by the statute to be unlawful shall be liable to the one injured thereby.—*Penn Refining Co. v. Western New York & P. R. Co.*, U. S. S. C., 28 Sup. Ct. Rep. 268.

26. **Duty to Receive and Transport.**—A common carrier is under no duty to haul cars owned and fitted up by showmen, and used exclusively by them to house and transport their employees and show property.—*Cleveland, C. & St. L. Ry. Co. v. Henry*, Ind., 83 N. E. Rep. 710.

27. **Injuries to Passengers.**—A passenger injured while attempting to board a train held guilty of contributory negligence precluding a recovery.—*Louisville & N. R. Co. v. Lawler*, Ky., 107 S. W. Rep. 702.

28. **Rights of Connecting Carriers.**—A connecting carrier receiving a shipment is entitled to the benefits of the original contract, if its terms can be given legal effect.—*International & G. N. R. Co. v. Vandeventer*, Tex., 107 S. W. Rep. 560.

29. **Special Damages.**—Notice not having been given to a carrier of any special use to which goods shipped were to be applied, the carrier held not liable for special damages.—*Matheson v. Southern Ry. Co.*, S. C., 60 S. E. Rep. 437.

30. **Champerly and Maintenance—Conveyance of Mineral Rights.**—A conveyance of mineral rights held not void as champertous by reason of possession of the land by another person claiming it adversely.—*Price v. Big Sandy Co.*, Ky., 107 S. W. Rep. 725.

31. **Constitutional Law—Class Legislation.**—Rev. St. 1889, sec. 997 (Ann. St. 1906, p. 878), providing where suits against corporations may be brought, held not invalid as class legislation, when considered in connection with section 971 (Ann. St. 1906, p. 862), notwithstanding section 362 (Ann. St. 1906, p. 591).—*Julian v. Kansas City Star Co.*, Mo., 107 S. W. Rep. 496.

32. **Statute as to Labor Unions.**—Personal liberty as well as right of property held invaded without due process of law in violation of Const. U. S. Amend. 5, and Act June 1, 1898, c. 370, sec. 10, 30 Stat. 424, making it a criminal offense against the United States for an interstate carrier to discharge an employee because of membership in a labor union.—*Adair v. United States*, U. S. S. C., 28 Sup. Ct. Rep. 277.

33. **Statute Conferring Nonjudicial Powers on Courts.**—Laws 1905, p. 2092, c. 737, giving the Appellate Division jurisdiction to review an order of the commission of gas and elec-

tricity fixing the rates, held not objectionable as conferring nonjudicial powers on such court.—*Trustees of Village of Saratoga Springs v. Saratoga Gas, Electric Light & Power Co., N. Y.*, 83 N. E. Rep. 693.

34.—**Validity of Statute.**—In the absence of a definite specification of the reason why an act is unconstitutional, without reference to a specified portion of that instrument, the presumption that the act is constitutional is superior to the assumption that the act is generally unconstitutional.—*Griggs v. State, Ga.*, 60 S. E. Rep. 364.

35. **Continuance—Terms.**—An order granting a continuance provided that plaintiff pay or secure the costs of the term, including witness fees and mileage, held a proper exercise of discretion, whether Kirby's Dig., sec. 6175, is directory or mandatory.—*Boone v. Skinner, Ark.*, 107 S. W. Rep. 673.

36. **Convicts—Hiring Bond.**—Where the obligors on a convict hiring bond defend an action thereon on the ground the convict had escaped and was rearrested and redelivered, the burden is on them to establish the escape.—*Salzer v. Wilcox, Tex.*, 107 S. W. Rep. 654.

37. **Copyrights** — Publication Abroad.—An American copyright held not lost by publishing a book abroad without inserting notice of copyright, under Act June 18, 1874, c. 301, sec. 1, 18 Stat. 78 (U. S. Comp. St. 1901, p. 3411).—*United Dictionary Co. v. G. & C. Merriam Co., U. S. S. C.*, 28 Sup. Ct. Rep. 290.

38. **Corporations** — Accommodation Paper.—Where plaintiff, when it accepted the note of a corporation as security to a personal debt of the secretary and treasurer, knew that the note had not been authorized or ratified, the corporation was not liable to plaintiff thereon.—*El Dorado Imp. Co. v. Citizens' Bank, Ark.*, 107 S. W. Rep. 676.

39.—**Incorporation and Organization.**—Without organization under a corporate charter, which has been granted, there can be no corporate act, no corporate property, and no corporate liability.—*Michael Bros. Co. v. Davidson & Coleman, Ga.*, 60 S. E. Rep. 362.

40.—**Who May Plead Ultra Vires.**—In an action by a corporation on a purchased claim for damages, held that, though the purchase was ultra vires, where the contract was executed, it was binding on the seller, and defendant could not raise the question of ultra vires.—*J. M. Guffey Petroleum Co. v. Jeff Chaison Townsite Co., Tex.*, 107 S. W. Rep. 609.

41. **Courts—Conflicting Jurisdiction.**—Where a court of competent authority appoints a receiver, no other court of co-ordinate jurisdiction can interfere with the receiver's possession.—*State v. Reynolds, Mo.*, 107 S. W. Rep. 487.

42. **Criminal Evidence—Bill of Exceptions.**—Where information is sufficient and the statement of facts and bills of exception were not filed until after the term of court had adjourned, conviction will be affirmed.—*Duckworth v. State, Tex.*, 107 S. W. Rep. 543.

43.—**Res Gestae.**—Exclamations or complaints which are spontaneous manifestations of distress or pain or suffering are admissible as original evidence as res gestae, and may be testified to by any person in whose presence they are uttered.—*Runnells v. Pecos & N. T. Ry. Co., Tex.*, 107 S. W. Rep. 647.

44.—**Violation of Ordinance.**—The same

strictness is not required in an information for violation of a city ordinance as in an indictment.—*City of Gallatin v. Fannin, Mo.*, 107 S. W. Rep. 479.

45. **Criminal Law—Extent of Punishment.**—The solicitor held properly permitted to read affidavits in aggravation of the crime for which defendant was convicted on his being called for sentence, to enable the court to exercise its discretion under Cr. Code 1902, sec. 120, as to the term of imprisonment.—*State v. Reeder, S. C.*, 60 S. E. Rep. 434.

46.—**Removal of Prisoner for Trial.**—In a proceeding for the removal of prisoners indicted in the district of Idaho from the district of Wisconsin for trial, a certified copy of the indictment is sufficient to make out a prima facie case of probable cause.—*United States v. Barber, U. S. D. C., W. D. Wis.*, 157 Fed. Rep. 889.

47. **Criminal Trial—Comments of Counsel.**—A conviction will not be reversed for improper comments of counsel, which were immediately withdrawn, and the jury was instructed to disregard them, and do not seem to have effected the verdict.—*People v. Gillette, N. Y.*, 83 N. E. Rep. 680.

48.—**Continuance.**—Refusal to postpone the trial until the next day on account of accused's counsel's fatigue was not unreasonable, where accused had other able counsel and the court was without other work.—*State v. Rabens, S. C.*, 60 S. E. Rep. 442.

49.—**Preliminary Hearing.**—Accused having waived a preliminary examination, his counsel held not entitled to an examination and cross-examination of the state's witnesses under Cr. Code 1902, sec. 24.—*State v. Rabens, S. C.*, 60 S. E. Rep. 442.

50.—**Rape.**—Where the only defense is an alibi, if an appropriate charge has been refused, or an exception has been reserved for omission of a proper instruction, a judgment of conviction will be reversed.—*Ballentine v. State, Tex.*, 107 S. W. Rep. 546.

51. **Damages—Pleading and Proof.**—In an action for injuries to plaintiff's wife, evidence as to her health more than five years prior to the accident held not objectionable for remoteness.—*Partello v. Missouri Pac. Ry. Co., Mo.*, 107 S. W. Rep. 473.

52. **Death—Statutes.**—Act 1903, p. 938, c. 317, relating to the abatement of suits for death by wrongful act, on the death of the beneficiary, held not to apply to an action in which a plea in abatement had been sustained before the enactment of the statute.—*St. Louis, I. M. & S. Ry. Co. v. Leazer, Tenn.*, 107 S. W. Rep. 684.

53. **Dedication—Highways.**—The fact that the course of a road deviates from a straight line to avoid trees and mud is immaterial in determining whether the evidence shows such use of the road as to warrant a presumption of dedication to the public.—*Gillespie v. Duling, Ind.*, 83 N. E. Rep. 728.

54. **Deeds—Construction.**—The intention of the parties should govern in the construction of a deed, and this is to be gathered from a consideration of the whole instrument.—*Crawford v. Atlantic Coast Lumber Co., S. C.*, 60 S. E. Rep. 445.

55. **District and Prosecuting Attorneys—Compensation.**—A county attorney performing services under an appointment by the fiscal court as commissioner in the settlement and compromise of the bonded indebtedness of the

county held entitled to compensation therefor, notwithstanding Const. sec. 161.—*Slayton v. Rogers*, Ky., 107 S. W. Rep. 696.

56. **Eminent Domain**—Remedies of Property Owners.—A lot owner in Illinois, who owns to the center of a street subject to easement of street use, may under the law of that state maintain a suit in equity to determine the right of a corporation to condemn right of way over such street for a railway track under the statutes of the state.—*Greene v. Aurora Rys. Co.*, U. S. C. C. of App., Seventh Circuit, 157 Fed. Rep. 85.

57. **Evidence**—Opinion Evidence.—The testimony of witnesses in libel as to what they understood alleged libelous words to mean is opinion evidence, and the jury are not bound by it.—*Julian v. Kansas City Star Co.*, Mo., 107 S. W. Rep. 496.

58.—**Secondary Evidence**.—The testimony of a party that a letter from the adverse party had never been received does not warrant the exclusion of a copy of the letter after a sufficient predicate had been laid for its introduction.—*Jacksboro Stone Co. v. Fairbanks Co.*, Tex., 105 S. W. Rep. 567.

59.—**Waivers**.—Parol evidence is inadmissible to show a waiver of a condition in an insurance policy when the contract was made.—*Johnson v. Continental Ins. Co. of New York*, Tenn., 107 S. W. Rep. 688.

60. **Exceptions, Bill of**—Motion for New Trial.—A motion for a new trial will carry the case to the succeeding term, and all exceptions taken at the term the motion was filed may be preserved after the motion is overruled.—*Fenrich v. Burress*, Mo., 107 S. W. Rep. 465.

61. **Executors and Administrators**—Removal.—That a judgment refusing to remove an administrator is informal held to furnish no ground for dismissing an appeal therefrom.—*Hilton v. Hilton*, Adm'r., Ky., 107 S. W. Rep. 736.

62. **Fire Insurance**—Assignment.—Consent by the local agent of a fire insurance company to assignment of a policy held binding on the company, or a waiver of the company's right of forfeiture, notwithstanding the policy provided that no assignment should be valid unless made as therein prescribed.—*Home Ins. Co. of New York v. Myers*, Ky., 107 S. W. Rep. 719.

63.—**Non-Payment of Premium**.—Statements of an insurance agent who issued a policy held insufficient to justify insured in assuming that a policy would not be forfeited for nonpayment of premium.—*Johnson v. Continental Ins. Co. of New York*, Tenn., 107 S. W. Rep. 688.

64. **Frauds, Statute of**—Oral Acceptance of Written Offer.—A promissory note by which the makers promised to pay a stated sum to the payee on a future date on surrender of certain shares of stock of a corporation, accepted by the payee, is a written contract to take and pay for such shares, and is not within the statute of frauds.—*In re Neff*, U. S. C. C. of App., Sixth Circuit, 157 Fed. Rep. 57.

65. **Gas**—Value of Franchise.—The value of franchises owned by a gas company determined in a suit to enjoin the enforcement of statutes fixing the price of gas as confiscatory.—*Consolidated Gas Co. v. City of New York*, U. S. C. C., 157 Fed. Rep. 849.

66. **Grand Jury**—Qualifications.—Service as a grand juror is not an office "of honor or pro-

fit," within Const. art. 2, sec. 2, providing that no juror shall hold two offices of honor or profit at the same time.—*State v. Graham*, S. C., 60 S. E. Rep. 431.

67. **Highways**—Use for Travel.—Though persons may lawfully travel over highways in automobiles, a town is not liable for a failure to make special provisions required only for their safety and convenience, if the roads are kept reasonably safe and convenient for travel generally.—*Doherty v. Town of Ayer*, Mass., 83 N. E. Rep. 677.

68.—**What Constitutes**.—The fact that a road is not open at both ends, and furnishes access and egress to but one property owner, does not prevent its being a public highway.—*Gillespie v. Duling*, Ind., 83 N. E. Rep. 728.

69. **Homestead**—Property Constituting.—Lots held not exempt as a part of the homestead within the rule preserving the place of business, as part of the homestead under certain conditions.—*Schmick v. Simmons*, Tex., 107 S. W. Rep. 568.

70. **Homicide**—Evidence.—In a murder trial, a state could show that accused slapped his fiancée at a church shortly before the homicide, which followed her refusal to allow him to escort her home, and her permitting decedent to escort her.—*Moore v. State*, Tex., 107 S. W. Rep. 540.

71. **Husband and Wife**—Minor Husband.—The fact that the husband is a minor held not to save from invalidity the wife's deed of her separate property because of his not joining in it.—*Zimbleman v. Portwood*, Tex., 107 S. W. Rep. 584.

72. **Indictment and Information**—Sufficiency.—An indictment will be held sufficient if with reasonable implications from the facts charged it sufficiently apprises defendant of what he must be prepared to meet, and is sufficient to bar a subsequent prosecution.—*United States v. Barber*, U. S. D. C., N. D. Wis., 157 Fed. Rep. 889.

73. **Injunction**—Preventing Multiplicity of Suits.—A suit in equity may be maintained to enjoin the enforcement of an unconstitutional legislative act the failure to comply with which would subject complainant to innumerable suits for penalties.—*Consolidated Gas Co. v. City of New York*, U. S. C. C., S. D. N. Y., 157 Fed. Rep. 849.

74.—**Scope of Inquiry**.—On an application for temporary injunction, the only matter for consideration is whether or not the statements in the verified petition alone, or in connection with the affidavits filed with it, show such a condition as would authorize the relief sought.—*Owen County Burley Tobacco Soc. v. Brumback*, Ky., 107 S. W. Rep. 710.

75. **Internal Revenue**—Whisky.—The sale of a barrel of whisky to which had been added, after the barrel had been properly stamped, coloring matter, held not to authorize seizure and forfeiture to the United States, provided for by Rev. St. U. S., sec. 3455 (U. S. Comp. St. 1901, p. 2279).—*United States v. A. Graf Distilling Co.*, U. S. S. C., 28 Sup. Ct. Rep. 264.

76. **Interstate Commerce**—Freight Rates.—In proceedings before the railroad commission to fix freight rates, the fact that the commodity handled by a petitioner is interstate traffic held not to affect the jurisdiction of the commission.—*Southern Ry. Co. v. Hunt*, Ind., 83 N. E. Rep. 721.

77.—**Labor Unions.**—There is no such connection between interstate commerce and membership in a labor union as to authorize Congress by Act June 1, 1898, c. 370, sec. 10, 30 Stat. 424, to make it a crime against the United States for any state carrier to discharge an employee because of membership in a labor union.—*Adair v. United States*, U. S. S. C., 28 Sup. Ct. Rep. 277.

78. **Intoxicating Liquors**—Fixing Saloon Limits.—The act of the Legislature authorizing a city council to prescribe saloon limits therein is not unconstitutional as an improper delegation of legislative power to a city.—*Ex parte King*, Tex., 107 S. W. Rep. 549.

79. **Judgment**—Correction.—A clerical error in omitting to give judgment for costs, in the circuit court may be corrected in that court on motion.—*Hilton v. Hilton's Adm'r.*, Ky., 107 S. W. Rep. 736.

80.—**Res Judicata.**—The judgment in a proceeding to try the right of property levied upon finding the property not to be the property of the debtor is not admissible in an action by the successful claimant against the officer for damages for the seizure.—*Smith v. White*, W. Va., 60 S. E. Rep. 404.

81. **Jury**—Disqualification.—In a trial of one negro for murdering another, juror held not objectionable because they would give more weight to a white person's testimony than to a negro's.—*Moore v. State*, Tex., 107 S. W. Rep. 549.

82. **Justices of the Peace**—Certiorari.—Where the evidence before a justice shows that plaintiff's cow was damaged by being killed by defendant company, it was not error for the superior court to refuse a writ of certiorari.—*Seaboard Air Line Ry. v. Smith*, Ga., 60 S. E. Rep. 353.

83. **Landlord and Tenant**—Action for Rent.—In an action by a landlord for rent, an instruction held not erroneous as declaring as a matter of law a matter in issue.—*Cramer v. Nelson*, Mo., 107 S. W. Rep. 450.

84. **Limitation of Actions**—What Law Governs.—A petition in an action against a carrier for the value of goods lost in transit held to state a cause for action for breach of the common-law duty to deliver at the point of destination, so that the statute of limitations in force there controls the time in which the action may be brought.—*Merritt Creamery Co. v. Atchison, T. & S. F. Ry. Co.*, Mo., 107 S. W. Rep. 462.

85. **Mandamus**—When Lies.—Mandamus does not lie to compel the county commissioners to perform their duty to repair or build a courthouse.—*Ward v. Commissioners of Beaufort County*, N. C., 60 S. E. Rep. 418.

86. **Maritime Liens**—Domestic Vessel Not in Commission.—Services rendered to a domestic vessel after she has been laid up at a wharf for the winter, in pumping her out, attending to her lines, etc., are not those of a mariner, and cannot be made the basis of a maritime lien.—*The James T. Furber*, U. S. D. C., D. Maine, 157 Fed. Rep. 124.

87. **Master and Servant**—Fellow Servants.—Tracks owned and operated by a private corporation in its own yard held to constitute a railroad within the contemplation of fellow servants' act of 1897 (*Sayles' Ann. Civ. St. 1897*, art. 4560f).—*Cunningham v. Neal*, Tex., 107 S. W. Rep. 539.

88.—**Fellow Servants.**—The rule exempting a master from liability for injuries resulting from negligence of a fellow servant held not to apply if the servants are in separate and distinct departments.—*Koerner v. St. Louis Car Co.*, Mo., 107 S. W. Rep. 481.

89.—**Fellow Servants.**—The conductor of a freight train and the engineer and engine foreman of another engine with which they collided are fellow servants under the common law.—*Wabash R. Co. v. Hassett, Ind.*, 83 N. E. Rep. 705.

90.—**Negligence in Employing Incompetent Servant.**—An employer who negligently employs or retains an incompetent employee is liable for injury to another employee caused by such incompetent employee's negligence.—*Indiana Union Traction Co. v. Fring, Ind.*, 83 N. E. Rep. 733.

91.—**Personal Injuries.**—In an action for injuries to a railroad brakeman whose foot was caught in a guard rail in attempting to couple a car having a defective coupler, plaintiff held not to have assumed the risk as a matter of law in attempting to couple the car and in being caught by the guard rail.—*Hynson v. St. Louis Southwestern Ry. Co.*, Tex., 107 S. W. Rep. 625.

92.—**Responsibility of Master for Injury to Employee.**—The responsibility of a master held not affected by the fact that a switchman to whom the duty of warning other employees was intrusted was not a servant of high degree.—*Koerner v. St. Louis Car Co.*, Mo., 107 S. W. Rep. 481.

93. **Mines and Minerals**—Leases.—In an action for rent under a lease for oil and gas, held that it would be presumed, until the contrary was shown, that the pressure in the well continued as shown at the completion thereof.—*Moore v. Ohio Valley Gas Co.*, W. Va., 60 S. E. Rep. 401.

94. **Mortgages**—Foreclosure.—An affidavit in foreclosure that defendant's agent told affiant that the owner was a nonresident, and that affiant knew of no other source from which he could gain information respecting the owner, is sufficient to authorize an order of service by publication.—*Evans v. Weinstein*, 108 N. Y. Supp. 753.

95. **Municipal Corporations**—Removal of Awnings.—In determining the scope of an ordinance requiring the removal of stationary awnings held immaterial whether the posts of the awnings were just inside or just outside the edge of the sidewalk.—*Small v. Councilmen of Edenton*, N. C., 60 S. E. Rep. 413.

96.—**Removal of Employee.**—An employee in the tenement house department of a city held properly removed on charges made in view of his answers and refusal to make explanations.—*People v. Butler*, 108 N. Y. Supp. 848.

97.—**Validity of Ordinance.**—An ordinance authorizing an election between certain kinds of sidewalk material held not void because of the method of determining the width of the walk.—*Nell v. Power*, Ky., 107 S. W. Rep. 694.

98. **Negligence**—Dangerous Premises.—Plaintiff's injury, caused by reason of his team becoming frightened on account of the condition and use of defendant's buildings, held not proximately due to any negligence on the part of defendant.—*Black v. Southern Cotton Oil Co.*, S. C., 60 S. E. Rep. 447.

99.—**Parties Liable.**—In an action for death caused by the parting of an electric light wire,

where the defense was that defendant had sold all his interest in the electric light business to a corporation, evidence held sufficient to take the question of ownership to the jury.—*Gordon v. Ashley*, N. Y., 83 N. E. Rep. 686.

100.—**Res Ipsa Loquitur**.—Where, in a negligence case, the rule *res ipsa loquitur* applies, the burden of proof is not thereby shifted to defendant. It only establishes a *prima facie* case for plaintiff, which must be met by defendant.—*Cunningham v. Dady*, N. Y., 83 N. E. Rep. 689.

101.—**Partition**.—Who May Maintain.—Persons entitled to a share of the proceeds of a sale of an interest in land to be made after the death of a life tenant have no estate or interest upon which they can maintain a bill for sale for partition.—*McKnight v. McKnight*, Tenn., 107 S. W. Rep. 682.

102.—**Partnership**.—As to Third Persons.—An understanding between parties that, while doing business as partners, they intended to incorporate, which they subsequently did, held not binding on one who dealt with them as partners.—*Michael Bros. Co. v. Davidson & Coleman*, Ga., 60 S. E. Rep. 362.

103.—**Banking Firm**.—Where a banking firm was a partnership consisting of two members both partners held proper parties in an action arising from a firm obligation.—*Hoskins v. Velasco Nat. Bank*, Tex., 107 S. W. Rep. 598.

104.—**Payment**.—Extension of Credit.—Where a debt is payable on demand, and security is given for it and for future advancements, it is an extension of time of payment of the debt.—*Muir v. Greene*, N. Y., 83 N. E. Rep. 685.

105.—**Penalties**.—Evidence.—It is incumbent in an action to recover a penalty for plaintiff to prove its case by a preponderance of the evidence, and it need not show a violation of the statute beyond a reasonable doubt.—*United States v. Central of Georgia Ry. Co.*, U. S. D. C., N. D. Ala., 157 Fed. Rep. 893.

106.—**Pleading**.—Petition.—Failure to style a petition for injunction a "petition in equity" is not a cause for dismissal, since under Civ. Code Prac., sec. 10, it may be transferred to the proper docket.—*Owen County Burley Tobacco Soc. v. Brumback*, Ky., 107 S. W. Rep. 710.

107.—**Principal and Agent**.—Compensation for Services.—Where plaintiff declared on a contract to pay him 10 per cent. of the cost of the building to be constructed for services rendered, he could not recover in the absence of proof of the actual cost of the building.—*Fish v. Hahn*, 108 N. Y. Supp. 782.

108.—**Nature of Agent's Obligation**.—A breach of the loyalty due a principal from his agent held a fraud of such nature as to preclude the agent from claiming his commissions.—*Williams v. Moore-Gaunt Co.*, Ga., 60 S. E. Rep. 372.

109.—**Power of Attorney**.—A power of attorney held insufficient to authorize the conveyance of a portion of the premises in consideration of disbursements by the grantee in defense of a suit to recover a portion of the land.—*Brown v. Orange County*, Tex., 107 S. W. Rep. 607.

110.—**Public Lands**.—Railroad Land Grants.—No rights under Act March 3, 1875, c. 152, 18 Stat. 482 (U. S. Comp. St. 1901, p. 1568), granting rights of way to railroads, can be initiated before a profile map has been filed in the local land office and approved by the Secretary of

the Interior, unless actual construction is sooner begun, in view of section 4 of such act.—*Minneapolis, St. P. & S. S. M. Ry. Co. v. Doughty*, U. S. S. C., 28 Sup. Ct. Rep. 291.

111.—**Railroads**.—Frightening Horses.—A railroad company held liable for the negligence of its servants in frightening the team of plaintiff by the operation of an engine.—*St. Louis Southwestern Ry. Co. of Texas v. Moore*, Tex., 107 S. W. Rep. 658.

112.—**Injury to Pedestrian Under Bridge**.—Whether a road under a railroad bridge had been habitually used by the public with the acquiescence of the railroad company so as to impose the duty of exercising ordinary care towards travelers held for the jury.—*Missouri, K. & T. Ry. Co. of Texas v. Hollan*, Tex., 107 S. W. Rep. 642.

113.—**Laborers**.—Labor in taking down and putting up a railway right of way fence to better enable laborers to clear the right of way of weeds, etc., and labor in mowing weeds, etc., off a tie plant yard, held labor performed within Sayles' Ann. Civ. St. 1897, art. 3312.—*Missouri, K. & T. Ry. Co. of Texas v. Bryan*, Tex., 107 S. W. Rep. 572.

114.—**Receivers**.—Nature of Receiver's Possession.—A receiver is the arm of the court which appoints him, and whatever he does under orders of the court regarding the property in his hands is the act of the court.—*State v. Reynolds*, Mo., 107 S. W. Rep. 487.

115.—**Removal of Causes**.—Federal Questions.—To authorize a state court to remove a cause to the federal court on the ground that a federal question is involved, it must appear that the construction of a federal statute is necessary to the determination of the case.—*Missouri, K. & T. Ry. Co. v. Hollan*, Tex., 107 S. W. Rep. 642.

116.—**Sales**.—Performance.—A sale of personal property is not complete where anything remains to be done by the seller, such as the selection of an article sold from a larger quantity in bulk.—*Pabst Brewing Co. v. Commonwealth*, Ky., 107 S. W. Rep. 728.

117.—**Premature Shipment of Goods**.—A buyer held not liable on its contract of purchase unless it waived the premature shipment of the goods by the seller, and accepted them as having been shipped in accordance with the contract.—*Jacksboro Stone Co. v. Fairbanks Co.*, Tex., 107 S. W. Rep. 567.

118.—**Recoupment in Action for Price**.—Where, in a suit for the price of goods, purchaser admits the receipt thereof and the correctness of the price, the burden is on purchaser to establish his plea to recoupment.—*Gem Knitting Mills v. Empire Printing & Box Co.*, Ga., 60 S. E. Rep. 365.

119.—**Set-Off and Counterclaim**.—Amount of Recovery.—In an action by assignees of an apportionment warrant for the cost of laying a sidewalk, defendant held not entitled to recover on her counterclaim for damages for change of the grade of the walk more than plaintiffs were entitled to under their warrant.—*Nell v. Power*, Ky., 107 S. W. Rep. 694.

120.—**Street Railroads**.—Collision with Vehicle.—While a motorman need not stop or slow up his car on seeing a vehicle on the track, however distant, it is his duty to do so in time to prevent a collision.—*Prendeville v. St. Louis Transit Co.*, Mo., 107 S. W. Rep. 453.

121.—**Subrogation**.—Rights Acquired.—A purchaser at a judicial sale of land, procured by

him for repayment of money paid by him to discharge a lien reserved in a deed under which he claimed, executed by a wife, in which her husband did not unite, held to acquire only the rights of the grantee in such deed.—*Price v. Big Sandy Co.*, Ky., 107 S. W. Rep. 725.

122. **Taxation—Lands of United States.**—Lands of the United States are not taxed in violation of Act March 3, 1875, c. 139, sec. 4, 18 Stat. 474, by imposition under Laws Colo. 1887, pp. 340, 341, secs. 1-5, of a tax on the right of possession for mining purposes of a mining claim.—*Elder v. Wood*, U. S. S. C., 28 Sup. Ct. Rep. 263.

123. **Transfer of Lien to Purchaser of Tax Title.**—In a suit by a tax sale purchaser to quiet title and to enforce a lien for taxes, parties not shown to be owners of the lands could not ask a reversal of a judgment decreeing a foreclosure of the tax lien.—*Holbrook v. Kunz*, Ind., 83 N. E. Rep. 730.

124. **Telegraphs and Telephones—Delay in Delivering Message.**—In an action against a telegraph company for delay in delivering a message, held that, in anticipation of defendant's introduction of evidence showing proper zeal in locating the sendee, plaintiff could prove that defendant, though informed of the sendee's whereabouts, failed to use ordinary care in locating her.—*Western Union Telegraph Co. v. Bell*, Tex., 107 S. W. Rep. 570.

125. **Tenancy in Common—Possession.**—Possession by M. in the right of his wife, one of the co-tenants to certain land up to 1883, during which M. at various times took deeds from other co-tenants, held the possession of all.—*Mott v. Carolina Land & Lumber Co.*, N. C., 60 S. E. Rep. 423.

126. **Trade-Marks and Trade Names—Deception of Public.**—The right to a name used by persons in their calling is similar to the right to the use of a trade-mark, which right equity will not protect where the name or phrase claimed as such is intended and calculated to deceive the public.—*Fay v. Lambourne*, 108 N. Y. Supp. 874.

127. **Unfair Competition.**—Successor to the business and good will of a safe company with the right to use the surname of the founder, cannot restrain the right of the founder's sons to continue in the business and use their own name in so doing.—*Donnell v. Herring-Hall-Marvin Safe Co.*, U. S. S. C., 28 Sup. Ct. Rep. 288.

128. **Trade Unions—Payment of Strike Benefits.**—Injunctions restraining the officers of a trade union from paying strike benefits held not sustainable to indirectly compel performance of a contract between the directors of the union and the employers, which had been repudiated.—*A. R. Barnes & Co. v. Berry*, U. S. C. C., S. D. Ohio, 157 Fed. Rep. 883.

129. **Trespass—To Try Title.**—A power of attorney reciting that G. was dead, and that B. was his heir, introduced as the basis of the introduction of a deed by the attorney in fact, held not to militate against a finding that the evidence did not show that B. ever had any title to the property.—*Brown v. Orange County*, Tex., 107 S. W. Rep. 607.

130. **Trial—Right to Grant Nonsuit.**—Where the acts proved correspond with the case laid in the petition, it is error to grant a nonsuit if a verdict is authorized for any amount of plain-

tiff's demand.—*Pendleton Bros. v. Atlantic Lumber Co.*, Ga., 60 S. E. Rep. 377.

131. **Trusts—Breach of Fiduciary Duty.**—Where, through the influence of a confidential relation, a person acquires title to property or obtains an unconscious advantage of another, courts will impress such property with a trust which will be enforced, unaffected by the statute of frauds.—*Sloan v. Macartney*, 108 N. Y. Supp. 840.

132. **Constructive Trusts.**—In an action between heirs to impress certain real estate conveyed to defendant with a trust in favor of plaintiffs, evidence examined, and held insufficient to show a parol agreement by defendant to hold the property and reconvey to grantor.—*Sloan v. Macartney*, 108 N. Y. Supp. 840.

133. **Husband and Wife.**—An agreement between a husband and wife, whereby the wife paid the note given by the husband for the price of land in consideration that the land should be hers, held not to create a resulting trust in the wife's favor.—*Allen v. Allen*, Tex., 107 S. W. Rep. 528.

134. **Venue—Domicile of Defendant.**—In an action against two partners, one residing in the county where the action was brought, and the other non-resident, the fact that the resident partner had been discharged in bankruptcy held not to entitle the non-resident defendant to be sued in the county of his domicile.—*Hoskins v. Velasco Nat. Bank*, Tex., 107 S. W. Rep. 598.

135. **Wills—Charities.**—A gift in trust to executors of money to be used in establishing a room for the exhibition of books, pictures, manuscripts and other relics held under the facts to fail and fall into the residue.—*Gill v. Attorney General*, Mass., 83 N. E. Rep. 676.

136. **Testamentary Powers.**—Under a will giving testator's daughter the right to dispose of real property by will to any of her children, she was without right to limit any of her children to a life estate, and, having done so, the children took the fee.—*Preston v. Preston*, Ky., 107 S. W. Rep. 123.

137. **Use of Pencil in Writing Will.**—The use of pencil in writing a will otherwise duly executed, or in altering the same, held as conclusive as to the intent of the testator as the use of pen and ink.—*LaRue v. Lee*, W. Va., 60 S. E. Rep. 388.

138. **Witnesses—Right to Impeach.**—By making defendant their witness, complainants preclude themselves from impeaching her credibility, but not from establishing facts contradicting her testimony.—*Buchanan v. Buchanan*, N. J., 68 Atl. Rep. 780.

139. **Work and Labor—Evidence.**—In an action for services rendered defendants in settling an indebtedness against a third person, evidence held to support a judgment for plaintiffs.—*Rutledge & Kilpatrick Realty Co. v. Gartside*, Mo., 106 S. W. Rep. 1126.

140. **Services of Wife.**—Statement of right of wife to recover for personal services in caring for a person when sick, though her husband had agreed to care for such person.—*Elsiminger v. Stanton*, Mo., 107 S. W. Rep. 460.

141. **Value of Services Rendered.**—Evidence of the cost of keeping a feeble minded person in an asylum is inadmissible in an action to recover for services in taking care of such person at his home.—*Stout's Adm'r v. Royston*, Ky., 107 S. W. Rep. 784.

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IT IS NECESSARY FOR ONE CONTRACTING WITH A BOARD OF ALDERMEN TO SEE THAT THE PRELIMINARY STEPS REQUIRED BY LAW HAVE BEEN TAKEN.

It happens so often that persons contracting with a board of aldermen are unable to collect for work done because some of the steps required by law have not been followed, that a few words upon this subject may be useful, so, we note here some of the interesting situations as found in a few important cases. The power of a municipality to contract for improvements is limited by the terms of the legislative enactment under which it proceeds, and any failure to comply therewith in any material matter, will, under a contract, be void; and no liability can arise out of a void contract. Says the Supreme Court of Iowa in the case of the Citizens' Bank v. City of Spencer, 126 Iowa, 121, 101 N. W. Rep. 643: "The law provides just how such matters may be done, and of this everyone is conclusively presumed to have notice. When acting without authority, or beyond its powers, the city council cannot estop the city, for, no matter what its representations, a party dealing with it is bound to take notice of all statutory limitations upon its authority. There can be no recovery even upon a quantum meruit, in such cases, especially where, as here, the city did not obligate itself to pay for the improvement, and was undertaking to do but a small part of it for its own benefit. Any other rule might completely ruin any city for, the legislature could not, if the reverse were true, limit the powers of a city council. When making any sort of a contract, the

city officials impliedly represent that they have authority to do so, but such representations are not binding upon the city, for the reason that the powers of these officials are limited, and we are bound to look to the law for their authority and the validity of their acts." Citing *Boston Co. v. City of Cambridge*, 163 Mass. 64, 39 N. E. Rep. 787; *Schumm v. Seymour*, 24 N. J. Eq. 143, and many other cases.

In the case of the *Boston Electric Co. v. City of Cambridge*: The city council, by a vote, authorized its committee on public property to contract "for the erection" of a school building in accordance with the plans and specifications of an architect, the total cost of the building not to exceed a sum named. Afterwards, this committee entered into an additional agreement with reference to supplying the school with certain electric appliances, speaking tubes, etc., making it exceed the original estimate \$134.50 contained in the specifications of the architect. The court held that the "contract being for the erection of the building, this having been done, its authority under the vote was exhausted. It was not even directed to superintend the erection of the building. Much less had its authority to add to the specifications, which were expressly referred to in the vote; and we can find in the report nothing to show that any such authority was conferred upon the committee afterwards."

In the case of *Johnson v. The Common Council*, 16 Ind. 227, the court said, 1. c. 228: "Touching the liability of the city, the charter under which the work in question was undertaken provided, that streets should be improved upon the petition of two-thirds of the property holders thereon; that the property holders should pay the contractor for the improvement in each case, except street and alley crossings;

that the city should not be liable to the contractor, except for such crossings. This charter, was a general law, of which the contractor was bound to take notice. It gave, as appears, to the city council, but a limited authority in the matter of street improvement; and prohibited the council from binding the city to pay for such improvements opposite the property of an individual proprietor; of this the contractor was bound to take notice, and hence the duty devolved upon him, before he took the contract, of ascertaining whether the council had so conducted the letting as to render the property holders liable. It was also his duty to satisfy himself of their ability to pay." *Swift v. City of Williamsburgh*, 24 Barbour, 407.

The court adds this dictum: "The case is a hard one. The appellant, relying upon the integrity and intelligence of the city council in the discharge of its duties, has entered into a contract which that council as the agent of the city, had no power, as the plaintiff was legally bound to know, to make or receive. The consequence is that no one, unless the members of the council personally is liable upon the contract." And concludes that, "the members of the council are liable personally, if the agent of an individual would be, under the circumstances. Citing *Angell & Ames on Corporations*, 250, *et seq.*

It is very important to examine the city ordinances as well as the statutes with regard to the requirements relating to the limits placed upon a city council thereby.

There are statutes requiring that city officers be residents of the city, and sometimes, for example, there is no person living in a city who is capable of doing the work of a city engineer, and it is necessary to get some one to do an engineer's work outside of the city. In order to make such an ordinance valid, such condition should be shown in the ordinance itself, otherwise it would be void.

There is generally provided a statute, in such cases, permitting a city to go outside, when it has not a resident citizen able to

act in a certain official capacity, which shows the importance of showing in the ordinance that the condition exists which gives rise to the necessity of employing some one other than a citizen of the city requiring such service.

NOTES OF IMPORTANT DECISIONS

CARRIERS OF PASSENGERS—DUTY TO PASSENGERS AT DESTINATION.—In *Smith v. North Carolina R. Co.* (N. C.), 61 S. E. Rep. 266, it is held to be the duty of a carrier not only to transport passengers to their destination, but that they must there be afforded a reasonable opportunity to alight in safety. The court presents the law points as follows:

"A common carrier is charged with the duty of carrying passengers to the point of their destination, and there affording them fair and reasonable opportunity to alight from the cars, and depart from the train yards or depot grounds in safety. In *Hutchinson on Carriers*, § 928, speaking of these obligations, the author says: 'It is the duty of railway companies, as carriers of passengers, to provide platforms, waiting rooms, and other reasonable accommodations for such passengers at the stations upon such road at which they are in the habit of taking on and putting off passengers. Their public profession as such carriers is an invitation to the public to enter and to alight from their cars at their stations, and it has been held that they must not only provide safe platforms and approaches thereto, but that they are bound to make safe, for all persons who may come to such stations in order to become their passengers, or who may be put off there by them all portions of their station grounds reasonably near to such platforms, and to which such persons may be likely to go; and for not having provided such station accommodations and safeguards, railway companies have frequently been held liable for injuries to such persons.' And in section 1117. 'The passenger is entitled not only to be properly carried, but he must be carried to the end of the journey for which he has contracted to be carried, and must be put down at the usual place of stopping.' And, further, in section 1118: 'When the conveyance has reached the destination of the passenger, the carrier must exercise the highest degree of practicable care, diligence, and skill in affording the passenger sufficient time and opportunity to alight, and if the usual sufficient time be not given him

to alight, and he is compelled to go on to the next station, or if a sudden start of the conveyance be made whilst he is in the act of alighting, and an injury is occasioned to him thereby, it will be negligence in the carrier for the consequences of which he will be responsible.' And Moore on Carriers states the same doctrine, as follows (section 38): 'It is the duty of the servants of a carrier of passengers, especially when in charge of a railroad train, to stop it a reasonable time to allow passengers to board or alight with safety; and, in the absence of contributory negligence on the part of the passengers, the carrier is liable for injuries resulting from a failure to perform this duty. * * * The duty resting upon a carrier involves the obligation to deliver its passengers safely at his desired destination, and that involves the duty of observing whether he has actually alighted before the car is started again. If the conductor fails to attend to this duty and does not give the passenger time enough to get off before the car starts, it is necessarily this neglect of duty which is the primary and proximate cause of the accident, if injury be occasioned thereby to the passenger. It is not a duty due a person solely because he is in danger of being hurt, but it is a duty owed to a person whom the carrier had undertaken to deliver, and who was entitled to the delivery safely, by being allowed to alight without danger.' As in other duties looking to the safety of their passengers, carriers are held to a high degree of care in respect to these obligations, and such duties are in no sense performed by stopping before they reach their usual place, nor in stopping before or at such place with cars on parallel tracks, so close together that, by the projection of the cars over the rails, passengers, in order to enter or alight from trains, are forced into a crowded passway, where the slightest motion of either train, or a rush of the passengers themselves, is not unlikely to result in painful, and at times serious, or even fatal, injuries."

The decision is one of undoubted importance, affirming, as it does, with vigor the duty of the carrier to take every reasonable precaution for the safety of the passenger.

MUTUAL BENEFIT INSURANCE—POWERS OF ASSOCIATION—ULTRA VIRES.—The case of *Starr v. Bankers' Union of the World*, is one growing out of the attempt of a mutual beneficiary society organized under the laws of Nebraska to purchase the business and assume the risk of another association of like character. The case is reported in 116 N.

W. Rep. (Neb.) 61. The association whose business, assets and liabilities were purchased was a Minnesota association.

The court held that the Bankers' Union of the World had no authority to purchase the business or assume the risks of the Order of the Iron Chain, the laws of Nebraska not giving such power. It is held that the Nebraska society not having the legal capacity to assume such an obligation, the contract by which a consolidation was attempted was void, and void not only in Nebraska, but in Minnesota as well, even though the contract would have been valid if made in Minnesota under the provisions of the Minnesota laws.

CANONS OF PROFESSIONAL ETHICS SUBMITTED BY SPECIAL COMMITTEE OF THE AMERICAN BAR ASSOCIATION.

I.

PREAMBLE.

In America where Justice reigns only by and through the people under forms of law, it is essential that the system for establishing and dispensing justice not only be developed to a high point of practical efficiency, but so maintained that there shall be absolute confidence on the part of the public in the fairness, the integrity and the impartiality of its administration; otherwise there can be no permanence to our republican institutions. Our profession is necessarily the keystone in the arch of republican government, and the future of the republic, to a great extent, depends upon our maintenance of the shrine of justice pure and unsullied. It cannot be so maintained unless the conduct and the motives of the members of our profession, who are the high priests of justice, are what they ought to be.

The high moral duty devolving upon every member of the American Bar has been declared by its great leaders in cogent utterances, constituting at once the lofty source and the fitting preamble of this code of professional ethics.

"There is certainly, without any exception, no profession in which so many temptations beset the path to swerve from the line of strict integrity, in which so many delicate and difficult questions of duty are continually arising. There are pitfalls and mantraps at every step, and the mere youth, at the very outset of his career, needs often the prudence and self-denial, as well as the moral courage, which belong commonly to riper years. High moral principle is the only safe guide, the only torch to light his way amidst darkness and obstruction."—*George Sharswood*.

"Craft is the vice, not the spirit, of the profession. Trick is professional prostitution. Falsehood is professional apostasy. The strength

of a lawyer is in thorough knowledge of legal truth, in thorough devotion to legal right. Truth and integrity can do more in the profession than the subtlest and wildest devices. The power of integrity is the rule; the power of fraud is the exception. Emulation and zeal lead lawyers astray; but the general law of the profession is duty, not success. In it, as elsewhere in human life, the judgment of success is but the verdict of little minds. Professional duty, faithfully and well performed, is the lawyer's glory. This is equally true of the Bench and of the Bar."—*Ryan, of Wisconsin*.

"Law is a deep science; its boundaries, like space, seem to recede as we advance; and though there be as much of certainty in it as in any other science, it is fit we should be modest in our opinions, and ever willing to be further instructed. Its acquisition is more than the labor of a life, and after all can be with none the subject of an unshaken confidence. In the language, then, of a late beautiful writer (Jameson), I am resolved to 'consider my own acquired knowledge but as a torch flung into an abyss, making the darkness visible, and showing me the extent of my own ignorance.'"—*David Hoffman*.

"Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often a real loser—in fees, expenses and waste of time. As a peacemaker the lawyer has a superior opportunity of being a good man. Never stir up litigation. A worse man can scarcely be found than one who does this. Who can be more nearly a fiend than he who habitually overhauls the register of deeds in search of defects in titles, whereupon to stir up strife and put money in his pocket? A moral tone ought to be enforced in the profession which would drive such men out of it."—*Abraham Lincoln*.

"Nothing is more to be dreaded than maxims of law and reasons of state blended together by judicial authority. Among all the terrible instruments of arbitrary power, decisions of courts, whetted and guided and impelled by considerations of policy, cut with the keenest edge, and inflict the deepest and most deadly wounds."—*James Wilson*.

"Justice is the great interest of man on earth."—*Daniel Webster*.

II.

THE CANON OF ETHICS.

No code or set of rules can be framed which will particularize all the duties of the lawyer in the varying phases of litigation or in all the relations of professional life. The following canons of ethics are adopted by the American Bar Association as a general guide, yet the enumeration of particular duties should not be construed as a denial of the existence of others equally imperative, though not specifically mentioned:

1. *Duties of Lawyers to Courts and Judicial Officers.* The law enjoins respect for courts and for judicial officers for the sake of the office, and not for the sake of the individual who for the time being administers its functions. A bad opinion of the incumbent, however well founded, cannot justify withholding from him the deference due the office while he is administering it. The proprieties of the judicial station limit the ability of judges to defend themselves, and in the discharge of their duties courts and judicial officers always should receive the support and countenance of the bar against unjust criticism and popular clamor.

2. *The Selection of Judges.* It is the duty of the bar to endeavor to prevent political considerations from outweighing judicial fitness in the selection of judges. It should protest earnestly and actively against the appointment or election of those who are unsuitable for the bench; and it should strive to have elevated thereto only those willing to forego other employments, whether of a business, political or other character, which may embarrass their free and fair consideration of questions before them for decision. The aspiration of lawyers for judicial position should be governed by an impartial estimate of their ability to add honor to the office, and not by a desire for the distinction the position may bring to themselves.

3. *Attempts to Exert Personal Influence on the Court.* Marked attention and unusual hospitality on the part of a lawyer to a judge, uncalled for by the personal relations of the parties, subject both the judge and the lawyer to misconstructions of motive and should be avoided. A lawyer should not communicate or argue privately with the judge as to the merits of a pending case, and he deserves rebuke and denunciation for any device or attempt to gain from a judge special personal consideration or favor. A self-respecting independence in the discharge of professional duty, without denial or diminution of the courtesy and respect due the judge's station, is the only proper foundation for cordial personal and official relations between bench and bar.

4. *When Counsel for an Indigent Prisoner.* A lawyer assigned as counsel for an indigent prisoner ought not to ask to be excused for any trivial reason, and should always exert his best efforts in his behalf.

5. *Defending One Whom Advocate Believes to Be Guilty.* A lawyer may undertake with propriety the defense of a person accused of a crime, although he knows or believes him guilty, and having undertaken it, he is bound by all fair and honorable means to present such defenses as the law of the land permits, to the end that no person may be deprived of life or liberty but by due process of law.

6. *Adverse Influences and Conflicting Interests.* It is the duty of a lawyer at the time of

retainer to disclose to the client all the circumstances of his relations to the parties, and any interest in or connection with the controversy, which might influence the client in the selection of counsel.

It is unprofessional to represent conflicting interests in the same suit or transaction, except by express consent of all concerned, given after a full disclosure of the facts. Within the meaning of this canon, a lawyer represents conflicting interests when, in behalf of one client, it is his duty to contend for that which duty to another client requires him to oppose.

The obligation to represent the client with undivided fidelity and not to divulge his secrets or confidences forbids also the subsequent acceptance of retainers or employment from others in matters adversely affecting any interest of the client with respect to which confidence has been reposed.

7. Professional Colleagues and Conflicts of Opinion. A client's proffer of assistance of additional counsel should not be regarded as evidence of want of confidence, but the matter should be left to the determination of the client after frank advice from counsel. A lawyer should decline association as colleague if it is objectionable to the original counsel. If the lawyer first retained is relieved, another may come into the case, but efforts, direct or indirect, in any way to encroach upon the business of another lawyer, are unprofessional.

When lawyers jointly associated in a cause cannot agree as to any matter vital to the interest of the client, the conflict of opinion should be frankly stated to him for his final determination as to the course to be pursued. His decision should be accepted unless the nature of the difference makes it impracticable for the lawyer whose judgment has been overruled to co-operate effectively. In this event it is his duty to ask the client to relieve him.

8. Advising Upon the Merits of a Client's Cause. A lawyer should endeavor to obtain full knowledge of his client's cause before advising thereon, and he is bound to give a candid opinion of the merits and probable result of pending or contemplated litigation. The miscarriages to which at times justice is subject, by reason of surprises and disappointments in evidence and witnesses, and through mistakes of juries and errors of courts, even though only occasional, admonish lawyers to beware of bold and confident assurances to clients, especially where the employment may depend upon such assurance. Whenever the controversy will admit of fair adjustment, the client should be advised to avoid or to end the litigation.

9. Negotiations with Opposite Party. A lawyer should not in any way communicate upon the subject of controversy with a party represented by counsel; much less should he undertake to

negotiate or compromise the matter with him, but should deal only with his counsel. It is incumbent upon the lawyer most particularly to avoid everything that may tend to mislead a party not represented by counsel, and he should not undertake to advise him as to the law.

10. Business Dealings with Clients. Lawyers should avoid becoming either borrowers or creditors of their clients; and they should scrupulously refrain from bargaining about the subject matter of their litigation.

11. Dealing with Trust Property. Money of the client or other trust property coming into the possession of the lawyer should be reported promptly, and except with the client's knowledge and consent should not be commingled with his private property or be used by him.

12. Fixing the Amount of the Fee. In fixing fees, the lawyers should avoid charges which overestimate their advice and services, as well as those which undervalue them. A client's ability to pay cannot justify a charge in excess of the value of the service, though his poverty may require a less charge, or even none at all. The reasonable requests of brother lawyers, and of their widows and orphans without ample means, should receive special and kindly consideration.

In determining the amount of the fee, the following elements should be considered: (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite properly to conduct the cause; (2) whether the acceptance of employment in the particular case will preclude the lawyer's appearance for others in cases likely to arise out of the transaction, and in which there is a reasonable expectation that otherwise he would be employed, or will involve the loss of other business while employed in the particular case or antagonisms with other clients; (3) the customary charges of the bar for similar services; (4) the amount involved in the controversy and the benefits resulting to the client from the services; (5) the contingency of the certainty of the compensation; and (6) the character of the employment, whether casual or for an established and constant client. No one of these considerations in itself is controlling. They are mere guides in ascertaining the real value of the service.

In fixing fees it should never be forgotten that the profession is a branch of the administration of justice, and not a mere money-getting trade.

13. Contingent Fees. Contingent fees may be contracted for, but they lead to many abuses, and should be under the supervision of the court.¹

14. Swing a Client for a Fee. Controversies with clients concerning compensation are to be avoided by the lawyer so far as shall be com-

(1) Hon. James G. Jenkins of the committee dissents from Canon 13, as he is opposed to contingent fees under any circumstances.

patible with his self-respect and with his right to receive reasonable recompense for his services; and lawsuits with clients should be resorted to only to prevent injustice, imposition or fraud.

15. *How Far a Lawyer May Go in Supporting a Client's Cause.* Nothing operates more certainly to create or to foster popular prejudice against lawyers as a class and to deprive the profession of that full measure of public esteem and confidence which belongs to the proper discharge of its duties than does the false claim, often set up by the unscrupulous in defense of questionable transactions, that it is the duty of the lawyer to do whatever may enable him to succeed in winning his client's cause.

A lawyer "owes entire devotion to the interest of his client, warm zeal in the maintenance and defense of his cause and the exertion of the utmost skill and ability," to the end that nothing may be taken or withheld from him, save by the rules of law, legally applied. Nevertheless, it is steadfastly to be borne in mind that the great trust is to be performed within and not without the bounds of the law. The office of attorney does not permit, much less does it demand for any client, violation of law or any manner of fraud or chicanery. No lawyer is justified in substituting another's conscience for his own. A lawyer should not do for a client what his sense of honor would forbid him to do for himself.

16. *Restraining Clients from Improprieties.* A lawyer should use his best efforts to restrain and to prevent his clients from doing those things which the lawyer himself ought not to do, particularly with reference to their conduct towards courts, judicial officers, jurors, witnesses and suitors. If a client persists in wrongdoing to the detriment of the administration of justice, the lawyer should terminate their relation.

17. *Ill-Feeling and Personalities Between Advocates.* Clients, not lawyers, are the litigants. Whatever may be the ill-feeling existing between clients, it should not be allowed to involve counsel in their conduct and demeanor toward each other or toward suitors in the case. All personalities between counsel should be scrupulously avoided. In the trial of a cause it is indecent to allude to the personal history or the personal peculiarities and idiosyncracies of counsel on the other side. Personal colloquies between counsel which cause delay and promote unseemly wrangling should also be carefully avoided.

18. *Treatment of Witnesses and Litigants.* A lawyer should always treat adverse witnesses and suitors with fairness and due consideration, and he should never minister to the malevolence or prejudices of a client in the trial or conduct of a cause. The client cannot be made the keeper of the lawyer's conscience in professional matters. He cannot demand as of right that his counsel shall abuse the opposite party or in-

dulge in offensive personalities. Improper speech is not excusable on the ground that it is what the client would say if speaking in his own behalf.

19. *Appearance of Lawyer as Witness for His Client.* When a lawyer is a witness for his client, except as to merely formal matters, such as the attestation or custody of an instrument and the like, he should leave the trial of the case to other counsel. Except when essential to the ends of justice, a lawyer should avoid testifying in court in behalf of his client. Similarly it is improper for a lawyer to assert in argument his personal belief in his client's innocence or the justice of his cause.

20. *Newspaper Discussion of Pending Litigation.* Newspaper publications by a lawyer as to pending or anticipated litigation may interfere with a fair trial in the courts and otherwise prejudice the due administration of justice. Generally they are to be condemned. If the extreme circumstances of a particular case justify a statement to the public, it is unprofessional to make it anonymously. An *ex parte* reference to the facts should not go beyond quotation from the records and papers on file in the court; but even in extreme cases it is better to avoid any *ex parte* statement.

21. *Punctuality and Expedition.* Lawyers owe it to the courts and to the public, whose business the courts transact, as well as to their clients, to be punctual in attendance, and to be concise and direct in the trial or disposition of their causes. They should try their cases on the merits, and should not resort to any legal technicalities not necessary to establish the merits.

22. *Candor and Fairness.* The conduct of the lawyer before the court and with other lawyers should be characterized by candor and fairness.

It is not candid or fair for the lawyer in opening his case, to mislead his opponent by concealing or withholding positions upon which he intends finally to rely; or in argument to assert as a fact that which has not been proved; or knowingly to misquote the contents of a paper, the testimony of a witness, the language or the argument of opposing counsel, or the language of a decision or a text-book; or with knowledge of its invalidity, to cite as authority a decision that has been overruled, or a statute that has been repealed.

It is unprofessional and dishonorable to deal other than candidly with the facts in taking the statements of witnesses, in drawing affidavits and other documents, and in the presentation of causes.

A lawyer should not offer evidence which he knows the court should reject, in order to get the same before the jury by argument for its admissibility, nor should he address to the judge arguments upon any point not properly calling

for determination by him. Neither should he introduce into an argument, suitably addressed to the court, remarks or statements intended to influence the jury or by-standers.

These and all kindred practices, appropriately termed "pettifoggery," are unprofessional and unworthy of an officer of the law charged, as is the lawyer with the duty of aiding in the administration of justice.

23. *Attitude Toward Jury.* All attempts to curry favor with juries by fawning, flattery or pretended solicitude for their personal comfort are unprofessional. Suggestions of counsel, looking to the comfort or convenience of jurors, and propositions to dispense with argument, should be made to the court out of the jury's hearing. A lawyer must never converse privately with jurors about the case; and both before and during the trial he should avoid communicating with them, even as to matters foreign to the cause.

24. *Right of Lawyer to Control the Incidents of the Trial.* As to incidental matters pending the trial, not affecting the merits of the cause, or working substantial prejudice to the rights of the client, such as forcing the opposite lawyer to trial when he is under affliction or bereavement; forcing the trial on a particular day to the injury of the opposite lawyer when no harm will result from a trial at a different time; agreeing to an extension of time for signing a bill of exceptions, cross interrogatories and the like, the lawyer must be allowed to judge. In such matters no client has a right to demand that his counsel shall be illiberal, or that he do anything therein repugnant to his own sense of honor and propriety.

25. *Taking Technical Advantage of Opposite Counsel; Agreements with Him.* A lawyer should not ignore known customs or practice of the bar or of a particular court, even when the law permits, without giving timely notice to the opposing counsel. As far as possible, important agreements, affecting the rights of clients, should be reduced to writing; but it is dishonorable to avoid performance of an agreement fairly made because it is not reduced to writing, as required by rules of court.

26. *Professional Advocacy Other Than Before Courts.* A lawyer openly, and in his true character may render professional services before legislative or other bodies, regarding proposed legislation and in advocacy of claims before departments of the government, upon the same principles of ethics which justify his appearance before the courts; but it is unprofessional for a lawyer so engaged to conceal his attorneyship, or to employ secret personal solicitations, or to use means other than those addressed to the reason and understanding to influence action.

27. *Advertising, Direct or Indirect.* The most

worthy and effective advertisement possible, even for a young lawyer, and especially with his brother lawyers, is the establishment of a well-merited reputation for professional capacity and fidelity to trust. This cannot be forced, but must be the outcome of character and conduct. The publication or circulation of ordinary simple business cards, being a matter of personal taste or local custom, and sometimes of convenience, is not *per se* improper. But solicitation of business by circulars or advertisements, or by personal communications or interviews, not warranted by personal relations is unprofessional. It is equally unprofessional to procure business by indirection through touters of any kind, whether allied real estate firms or trust companies advertising to secure the drawing of deeds or wills or offering retainers in exchange for executorships or trusteeships to be influenced by the lawyer. Indirect advertisement for business by furnishing or inspiring newspaper comments concerning causes in which the lawyer has been or is engaged, or concerning the manner of their conduct, the magnitude of the interests involved, the importance of the lawyer's positions, and all other like self-laudation, defy the traditions and lower the tone of our high calling, and are intolerable.

28. *Stirring Up Litigation, Directly or through Agents.* It is unprofessional for a lawyer to volunteer advice to bring a law suit, except in rare cases where ties of blood relationship or trust make it his duty to do so. Not only is stirring up strife and litigation unprofessional, but it is disreputable in morals, contrary to public policy and indictable at common law. No one should be permitted to remain in the profession who hunts up defects in titles or other causes of action and informs thereof in order to be employed to bring suit, or who breeds litigation by seeking out those with claims for personal injuries, or those having any other grounds of action in order to secure them as clients, or who employs agents or runners for like purposes, or who pays or rewards, directly or indirectly, those who bring or influence the bringing of such cases to his office, or who remunerates policemen, court or prison officials, physicians, hospital attaches or others who may succeed, under the guise of giving disinterested friendly advice, in influencing the criminal, the sick and the injured, the ignorant or others, to seek his professional services. A duty to the public and to the profession devolves upon every member of the bar, having knowledge of such practices upon the part of any practitioner, immediately to inform thereof to the end that the offender may be disbarred.

29. *Upholding the Honor of the Profession.* Lawyers should expose without fear or favor before the proper tribunals corrupt or dishonest conduct in the profession, and should accept

without hesitation employment against a member of the bar who has wronged his client. The counsel upon the trial of a cause in which perjury has been committed owe it to the profession and to the public to bring the matter to the knowledge of the prosecuting authorities. A lawyer should aid in guarding the bar against the admission to the profession of candidate; unfit or unqualified because deficient in either moral character or education. He should strive at all times to uphold the honor and to maintain the dignity of the profession, and to improve not only the law, but the administration of justice.

30. *Justifiable and Unjustifiable Litigations.* A lawyer must decline to conduct a civil cause or to make a defense when convinced that the purpose is merely to harass or injure the opposite party, or to work oppression and wrong.

He may counsel and maintain only such actions and proceedings as appear to him just. His appearance in court should be deemed equivalent to an assertion, on his honor, that in his opinion his client is justly entitled to some measure of relief refused by his adversary. Upon that measure he may insist, though he disapprove his client's character.

31. *Responsibility for Litigation.* No lawyer is obliged to act either as adviser or advocate for any person who may wish to become his client. He has the right to refuse retainers. Every lawyer must decide what business he will accept as counsellor, what causes he will bring into court for plaintiffs, what cases he will contest in court for defendants. The responsibility for advising questionable transactions, for bringing questionable suits, for urging questionable defenses, is the lawyer's responsibility. He cannot escape it by urging as an excuse that he is only following his client's instructions.

32. *The Lawyer's Duty in Its Last Analysis.* No client, corporate or individual, however powerful, nor any cause, civil or political, however important, is entitled to receive, nor should any lawyer render, any service or advice involving disloyalty to the law whose ministers we are, or disrespect of the judicial office, which we are bound to uphold, or corruption of any person or persons exercising a public office or private trust, or deception or betrayal of the public. When rendering any such improper service or advice the lawyer lays aside his robe of office, and in his own person invites and merits stern and just condemnation. Correspondingly, he advances the honor of his profession and the best interests of his client when he renders service or gives advice tending to impress upon the client and his undertaking exact compliance with the strictest principles of moral law. He must also observe and advise his client to observe the statute law, though until a statute shall have been construed and interpreted by competent adjudication he is free and is entitled to advise as to

its validity and as to what he conscientiously believes to be its just meaning and extent. But above all, a lawyer will find his highest honor in a deserved reputation for fidelity to private trust and to public duty, as an honest man and as a patriotic and loyal citizen.

III.

OATH OF ADMISSION.

The general principles which should ever control the lawyer in the practice of his profession are clearly set forth in the following Oath of Admission to the Bar, formulated upon that in use in the State of Washington and which conforms in its main outlines to the "duties" of lawyers as defined by statutory enactments in that and many other states of the Union²—duties which they are sworn on admission to obey and for the wilful violation of which disbarment is provided:

"I do solemnly swear:

"I will support the Constitution of the United States and the Constitution of the State of ———

"I will maintain the respect due to courts of justice and judicial officers;

"I will counsel and maintain only such actions, proceedings and defenses as appear to me legally debatable and just, except the defense of a person charged with a public offense;

"I will employ for the purpose of maintaining the causes confided to me such means only as are consistent with truth and honor, and will never seek to mislead the judge or jury by any artifice or false statement of fact or law;

"I will maintain the confidence and preserve inviolate the secrets of my client, and will accept no compensation in connection with his business except from him or with his knowledge and approval;

"I will abstain from all offensive personality, and advance no fact prejudicial to the honor or reputation of a party or witness, unless required by the justice of the cause with which I am charged;

"I will never reject, from any consideration personal to myself, the cause of the defenseless or oppressed, or delay any man's cause for lucre or malice. *So help me God.*"

We commend this form of oath for adoption by the proper authorities in all the states and territories.

In submitting the above draft of a Code of

(2) Alabama, California, Georgia, Idaho, Indiana, Iowa, Minnesota, Mississippi, Nebraska, North Dakota, Oklahoma, Oregon, South Dakota, Utah, Washington and Wisconsin. The oaths administered on admission to the Bar in all the other States require the observance of the highest moral principle in the practice of the profession, but the duties of the lawyer are not as specifically defined by law as in the states named.

Ethics, the special committee in charge of the work makes the following explanation:

1. As directed by the Association at the 1907 meeting (*vide* A. B. A. Reports XXXI, 64), we have prepared and herewith transmit to you a draft for the proposed canons of professional ethics, and we very earnestly request your suggestions and criticisms. We ask, however, that if opposed to any of the canons you aid us by accompanying your remarks by a draft of the precise form in which you recommend wording the canons upon which you may comment. Our final report, based upon the suggestions and criticisms received, will be submitted to the Association in August, at Seattle, Washington, in accordance with our instructions.

2. We summarize briefly the movement which has culminated in this draft:

At the 1905 meeting of the Association held in Rhode Island, the chairman of the executive committee presented a resolution, which was adopted unanimously, providing for a special committee to report upon the "advisability and practicability" of the adoption of a code of professional ethics by the Association (Reports XXVIII, 132). At the Association's 1906 meeting, held in Minnesota, the committee reported favorably upon both points (*id.* XXIX, 600-604; reprinted as Appendix A of the committee's 1907 report *id.* XXXI, 681-684), and its recommendation, providing for a committee from Bench and Bar to draft a series of canons of professional ethics "suitable for adoption and promulgation" by the Association, was adopted unanimously (*id.* XXIX, 35). In 1907, at the meeting in Maine, your committee submitted a report (*id.* XXXI, 676-736), containing a compilation of the codes of ethics adopted in different States of the Union, and much other information, including a reprint of the *Hoffman Resolutions* in regard to professional deportment. The committee in its 1907 report *inter alia* recommended that Chief Justice Sharswood's book on *Professional Ethics* be reprinted as a volume of the A. B. A. Reports, and it has already been issued as volume XXXII. The committee in 1907 also reported:

"We believe that such canons (i. e., of professional ethics), to become practically effective, should be adopted only after mature and careful deliberation, and much fuller consideration on the part of our membership than is possible at one of our annual meetings.

"We believe that your committee in drafting the code should have the active assistance of every member of the Association with thoughts upon the subject, and that the recommendations which your committee may see fit to make should be considered, not only in connection with what has already been done in those States having codes of ethics, but also in the light of what has been said by individuals who have di-

rected their attention particularly to the subject."

The 1907 report of the committee was approved by the Association (Reports XXXI, p. 64), and the committee was directed to transmit a copy of the Sharswood reprint and of the committee's 1907 report to each member of the Association and to request a careful examination of the documents set forth in the appendix thereto, and the submission of opinions and suggestions in the matter of the proposed canons of ethics; your committee was also directed to send the reprint and report to the secretary of each State Bar Association in the United States with similar requests, and to suggest that the same be referred to such committee as may be appropriate (*id.*, p. 64). These directions were followed by your committee in its printed letter of 20 November, 1907, to each member of the American Bar Association, and by its typewritten letter of 19 December, 1907, to the secretary of each State Bar Association in the United States. We received in reply many suggestions of value, which, with excerpts from able articles on the subject in some of the professional journals, American and English, were printed in a "Red Book" of 131 pages for the use of your committee and as an aid to it in its deliberations.

3. In the following States there are codes of ethics, more or less complete, which exist as the result either of codification by statutory enactments of some of the "duties" of lawyers, or of the action of Bar Associations therein in adopting canons of professional ethics: Alabama, California, Colorado, Florida, Georgia, Idaho, Indiana, Iowa, Kentucky, Louisiana, Maryland, Michigan, Minnesota, Mississippi, Missouri, Nebraska, North Carolina, North Dakota, Oklahoma, Oregon, South Dakota, Utah, Virginia, Washington, West Virginia and Wisconsin. In addition to these States there are in the following Bar Association Committees, which have been charged within the last year with the duty either of reporting upon or aiding in the work your committee has in hand, to-wit: Illinois, Kansas, Massachusetts, Montana, New York, Ohio, Pennsylvania and Vermont. There are also committees co-operating in a number of the States which already have codes, and your committee is at frequent intervals being advised that State Bar Association committees are being named to help the movement—a movement which should culminate in an authoritatively declared standard of professional conduct, which will not only serve as a guide to the youthful practitioner, but will place the profession, *qua* profession, before the public in its true light, and thereby free it from the unmerited public criticism and censure which have at times been bestowed upon it by the unthinking, as a result of the misconduct of the small percentage of unworthy men who steal into its ranks, yet who in no way represent its spirit or morale.

4. The foundation of the draft for canons of ethics, herewith submitted, is the code adopted by the Alabama State Bar Association in 1887, and which, with but slight modifications, has been adopted in eleven other States. The committee in this connection desire to record their appreciation of the help they have received in this work from their fellow member, Honorable Thomas G. Jones,³ of Alabama, who was the draftsman of the Alabama code of ethics, and who attended the three days' session of your committee in Washington, 30 March to 1 April, 1908, and moved the adoption of a number of your committee's modifications of the Alabama code drafted by him more than a score of years ago.

The committee approved the suggestions of Mr. Justice Brewer (reported A. B. A. Reports, Vol. XXXI, pp. 62-63). The first of his two proposals, "the preparation of a body of rules," "few in number, clear and precise in their provisions, so that there can be no excuse for their violation," "to be given operative and binding force by legislation or the action of the highest courts of the states, assuming that those courts have, as doubtless they have in some states, the power to make and enforce such rules," has resulted in the recommended form for Oath of Admission. The second is embodied in subdivision II.

The annexed draft for the canons represents our best present judgment after a most careful consideration of the subject; but we hope that the committees of the respective State Bar Associations will aid us with their advice, and that every member of the American Bar, whether a member of the American Bar Association or not, will freely and frankly criticize the canons and advise the committee of any point, whether of substance or phraseology, with which he is not in accord, and will also submit draft for any additional canons which he believes should be inserted.

(3) Judge Jones desires to be recorded as not concurring in the personal reference to himself.

MASTER AND SERVANT—DUTY OF MASTER TO FURNISH SAFE APPLIANCES.

RUSH v. OREGON POWER CO.

Supreme Court of Oregon. April 28, 1908.

An employer must exercise diligence to furnish to its employees reasonably safe appliances, and, in the absence of any notice thereof, the employees may assume that the duty has been discharged.

Where, in an action for injuries to a brakeman while uncoupling cars, the jury could have found that a chain attached to a coupler was too short and insufficient; that, if the railroad

had exercised reasonable care in inspecting the chain after it had been repaired, the defect would have been discovered; that the injuries could reasonably have been foreseen or guarded against; and that the brakeman had no knowledge of the imperfection—it was error to grant a nonsuit.

This is a suit by Mark Rush against the Oregon Power Company, a corporation, to recover damages for a personal injury suffered by the plaintiff while engaged as a brakeman in the employ of the defendant. The negligence stated in the complaint is the failure of the defendant to inspect two freight cars, the brakes of which, it is alleged, were out of order and so defective that they would not hold when the cars were loaded, and also the heedless putting into a train, without examination, other cars on which were defective couplings with short and inadequate chain connections, which imperfections were known to the defendant, or, by the exercise of reasonable care on its part, might have been known by it, but to the plaintiff were unknown, who, in attempting to uncouple the latter cars January 29, 1906, lost his right arm, particularly setting forth the facts and circumstances whereby the injury was sustained. The answer denies the negligence alleged, and avers that the hurt of which the plaintiff complains resulted from his own negligence and that of a fellow workman, and also that the plaintiff assumed the risk. The reply put in issue the allegations of new matter in the answer, and, the cause coming on for trial, a non-suit was given on motion of the defendant when the plaintiff had introduced his evidence and rested. From this judgment, he appeals.

MOORE, J. (after stating the facts as above): It is contended by plaintiff's counsel that an error was committed in granting the nonsuit. The consideration of this question necessitates an examination of the testimony relating to the place, cause, and circumstances attending the injury. It appears that the defendant owns a standard-gauge railroad which is built from Portland to other places, and operates on its lines by electricity cars for transporting passengers and freight, and maintains in such city a power house, to which extends from its main line a spur, and that other side tracks form at that place a yard where motors and cars are inspected. The plaintiff is an experienced brakeman, and at the time of his injury was employed as such by the defendant. The head brakeman, or conductor, as he is sometimes called, who was employed to switch cars in the Portland yard, did not report for duty January 29, 1906, whereupon the yardmaster ordered the plaintiff to perform that service, and directed him to go with a motor to the power house and remove there-

from some empty cars, and to place therein two cars loaded with cordwood. At the place indicated the main track of the railroad extends nearly south, and a side track branches to the west. The loaded cars were "kicked" back on the main line south of the switch, where they were left in charge of a person who set the brakes to hold them in position. The plaintiff, having removed from the power house five empty flat cars forming a train which was coupled at the north end to the motor, was passing over the switch that connects the main line and the side track, when the loaded cars, notwithstanding the friction of their brakes, rolled north, and the corner of the forward car struck the third empty car from the motor at a point about four feet south of its coupling, causing the latter to be slightly lifted from the track on the side where the collision occurred. The plaintiff, desiring to clear the track for a passenger car that was about due, went to the west side of the second car from the motor to uncouple that car, intending to move the disengaged part of the train to the north, so as to place a pole against it and the corner of the loaded car, which he expected to force back on the main line, and hold with the brakes until he could recouple the train, move it out of the way, and then return with the motor for the loaded cars; but he was unable to uncouple this car from the west side. He then attempted to separate the train from the opposite side, and went, for that purpose, to the corner of the empty car north of the point where it had been struck. This car had a Tower automatic coupler with a knuckle, which, when closed, was held in place by a pawl to which was attached a short iron rod with an eye at each end, connected at the top with a chain that extended upward and was fastened to an iron arm. This arm reached back to the center of the car's end, to which it was attached, and at this point was bent at a right angle horizontally, so as to extend along the framework of the car to a point near the corner, where it was again bent and turned downward, making a lever, the lifting of which raised the pawl and released the knuckle, thus avoiding the necessity of a person going between the cars to couple or uncouple them. The Tower coupler has a spring in the draw-head that keeps the pawl in position, and prevents it from being raised until the cars are forced together, releasing the tension, when the lever can be raised and the knuckle opened. The plaintiff, standing on the east side of the track, grasped with his right hand the lever at the corner of the third car, and gave with his left hand a signal to force the train slowly to the south, so as to slacken the strain, and the motorman, obeying the token, pushed the cars in that direction, but the plaintiff, being

unable to raise the lever or to release his hand therefrom, was pulled the intervening distance of about four feet until his body struck the corner of the loaded car, behind which his arm was drawn and injured, necessitating amputation at the shoulder. A small model of the Tower coupler was introduced in evidence, and has been sent up as an exhibit. An examination of this model shows that the upper eye of the iron rod or pin which is fastened to the pawl has connected therewith two links of a miniature chain and a tiny clevis that complete the connection with the iron arm which forms a part of the lever. A chain containing three constituent parts above the draw-head, namely, two links and a clevis, of relative proportions to that of the pattern before us, is of such length that, when the iron arm commences to raise the pawl, the lower end of the lever by which it is operated stands out at a sufficient angle from the corner of the car as to prevent one's hand from being caught by any counter pressure on the lever. As the chain is shortened, however, the lower end of the lever is necessarily brought down closer to the car, and, if sufficiently reduced, will strike the framework.

The plaintiff, as a witness in his own behalf, testified that it was necessary to force the cars back from six inches to two feet, so that the train could be uncoupled; that the chain on the Tower coupler at the north end of the third car, as it then stood on the track, had been repaired and consisted of only two constituent parts, one of which was a short, round, cold-shut link; that when he took hold of the lever, and gave the signal slowly to slacken the tension, the movement of the train caused the lever to tighten and caught his hand so so that he could not withdraw it, and that such retention could not have occurred if the chain had been of the regulation length; that, when the train was started, he partially stumbled, and was unable, with his left hand, to give a signal to check the motion, but when his arm was struck he hollowed and the motorman halted; and that in the few seconds after his hand was caught, and before his arm was injured, he for the first time noticed the defect in the chain. The plaintiff further testified that the empty cars which he tried to uncouple must have been brought into the yard the day before he was injured; that, upon the arrival of a train at such place, the cars are supposed to be inspected, and, when no "Bad order" tag appears on them, they are supposed to be in good condition, and that no mark of that kind was displayed on the car mentioned; that the distance of about four feet between the corner of such car and the corner of the car causing the collision afforded ample space for uncoupling, and if his hand had not been caught

in the lever he could have separated the train on the east side as well as from the opposite edge; and that, when he first tried to uncouple the car from the west side he could see that the collision was tipping the empty cars off the track towards him, and for that reason he went to the east side to disconnect the train.

A. A. Benjamin testified that on the day of the injury he was employed by the defendant as a brakeman in the yard, and was stationed by the plaintiff on the loaded cars when they were "kicked" back on the main line, and that he set the brakes on these cars as hard as he could, but the friction was insufficient to retain them where they were left, and they rolled north and collided with the empty cars that were then being moved over the switch.

The testimony fails to disclose any particular defect in the brakes on the loaded cars. As the mere happening of an accident is ordinarily insufficient to establish carelessness (*Duntley v. Inman*, 42 Or. 334, 70 Pac. Rep. 529, 59 L. R. A. 785), that part of the complaint which alleges negligence in placing in the train, without inspection, cars upon which were defective brakes, will not receive any attention. It was incumbent upon the defendant to exercise diligence to furnish to its servants reasonably safe appliances, and in the absence of any notice thereof the plaintiff had the right to assume that this duty had been fully discharged by the master. *Johnson v. Oregon Short Line Ry. Co.*, 23 Or. 94, 31 Pac. Rep. 283; *Geldhard v. Marshall*, 43 Or. 438, 73 Pac. Rep. 330; *Texas and Pac. Ry. Co. v. Archibald*, 170 U. S. 665, 18 Sup. Ct. Rep. 777, 42 L. Ed. 1188. To promote the safety of its servants a railroad company is obliged to keep its appliances in good and safe condition, and to cause as frequent and thorough inspection of its instrumentalities as can be done consistently with the conduct of its business, for the purpose of discovering any defects that may occur from accidental causes, the general effect of wear, or the progress of decay. *Miller v. Southern Pac. Co.*, 20 Or. 285, 26 Pac. Rep. 70. "The duty of a master," says a text writer, "to furnish reasonably safe premises, machinery, tools and appliances with or about which his servants are to work necessarily implies and includes the duty of making a reasonable inspection of such premises, machinery, tools, and appliances after they have become defective and have been repaired, to the end of seeing that the reparation makes them reasonably safe and sufficient." 4 *Thomp. Law Corp.* sec. 3788. The use of the cold-shut link tends to show that the chain had been repaired, and the mending had made it too short. The day prior to the injury the car having the defective chain was brought into the yard where inspection was expected to have been made. The defendant was thus afforded an opportunity, at

the proper place, to examine the repairs that had been made, and if that duty had been discharged, it would have discovered that the chain was too short. The defect in the chain was patent, and might have been discovered by the defendant by the exercise of reasonable and ordinary diligence, in which case notice of the imperfection will be presumed. 7 *Am. and Eng. Ency. Law* (2d Ed.) 1056; 6 *Cur. Law*, 545; *Belt Ry. Co. v. Confrey*, 111 Ill. App. 473; *Doyle v. Hawkins*, 34 Ind. App. 514, 73 N. E. Rep. 200. The plaintiff having testified that the train should have been moved from six inches to two feet, in order to relieve the tension on the springs in the drawheads, the space of four feet in which he was required to uncouple before a collision with the loaded car could have occurred was not so short that the court could as a matter of law determine that it afforded conclusive evidence of contributory negligence so as to take the cause from the jury. So, too, the fact that the empty cars were lifted from the east track by the collision, and the possibility of their being overturned to the west, on which side the plaintiff first tried to uncouple, thereby inducing him, as he testified, to undertake a separation of the train from the other side, is not such evidence of contributory negligence, in view of the danger of the empty cars being thrown off the track to the west, to afford evidence of contributory negligence.

It is generally held that a servant who unnecessarily adopts a dangerous method of performing the labor required of him assumes the resulting danger. 6 *Cur. Law*, 578. His choice of a customary method of doing such work, however, is not ordinarily regarded as negligent. *Id.* 584. The plaintiff, on cross-examination, in explaining his reason for going to the east side of the train to detach the cars, after his effort to uncouple the train on the west side had failed, said: "Well, the cars would not pull out. They were contact here on these corners, so the wheels started to raise off of the track on this flat car; so I didn't want to put them any farther. So I come over this car here, and had plenty of space here to pull this lever over and uncouple them here and back up, and I was on the right side, as any railroad man, to go and get the pole out of the door of the motor." It is fairly to be inferred from the latter part of the declaration quoted that the plaintiff chose the customary method of performing the service required under the conditions then existing. Believing that the jury might reasonably have found from the testimony given that the chain attached to the coupler was too short; that it was insufficient for the strains that ordinarily might be expected; that if the defendant had exercised reasonable care in inspecting its con-

dition after having been repaired, the defect would have been discovered, and the injuries could reasonably have been foreseen and guarded against; and that the plaintiff had no knowledge of the imperfection—an error was committed in granting the nonsuit.

The judgment will therefore be reversed and the cause remanded for a new trial.

Note.—Duty of Master to Furnish Safe Appliance—Contributory Negligence.—The general rule of law requires the employer to exercise diligence in the matter of appliances in order that his employees may not be in unnecessary danger. The master is charged with notice of the condition of his appliances, if a reasonable inspection would have disclosed their condition, even though as a matter of fact he may have neglected to inspect and consequently have been in actual ignorance of the facts. The master is bound to warn the employee of his danger unless the danger is so obvious the employee is presumed to have had notice, and is consequently charged with contributory negligence. The rule is not different in the case of a railroad company than in any other case. It is in every instance a question of what constitutes reasonable care. *O'Rourke v. Union Pac. R. Co.*, 22 Fed. Rep. 189; *Robinson v. Blake Mfg. Co.*, 143 Mass. 528; *Indianapolis, B. & W. Ry. Co. v. Toy*, 91 Ill. 474; *O'Connell v. Baltimore & O. R. Co.*, 20 Md. 212, 83 Am. Dec. 549.

The rule is thus stated in 26 Cyc. 1102: "The master is not an insurer of his servants' safety, but is only required to exercise such ordinary care and diligence as may be reasonable in view of the work to be performed and the dangers incident to the employment. Nevertheless, the degree of care which the law requires of the master is greater than that which is required of the servant, and the master may be chargeable with negligence in failing to ascertain a danger where the servant is not." See authorities cited.

Non-Suits—When Authorized.—As to non-suits the rule is that a case should go to the jury if there is any evidence which would sustain a verdict. If there is any evidence the question becomes one of fact for the jury to determine, and the court should not direct a non-suit. As stated in the principal case, if there is evidence from which the jury might find that the injuries could reasonably have been guarded against by a prudent employer, then the matter should go to the jury for its determination.

In this connection it may be observed that there are large numbers of cases being sent back by the appellate courts with directions to submit the issues to a jury after the trial court had in the first instance refused so to do. Errors of this nature are more injurious than might appear, for it is quite generally true that the plaintiffs are financially not in a position to conveniently meet the expenses connected with an appeal.

tle, Wash. A conference of the national uniform law commissioners will precede the meeting of the association, from August 21, 1908, to August 24th, inclusive.

Local arrangements for the convention are in the hands of W. A. Peters, New York Block, Seattle, Wash.

JETSAM AND FLOTSAM.

A NEW FEDERAL COURT.

The committee of the American Bar Association on patents, trade marks and copyright law have issued a circular to those who are interested in the establishment of the proposed new court of patent appeals, urging them to use their influence to obtain the adoption by congress of the pending legislation. Although this subject has been before the public for nearly eight years, and the plan has been worked out in detail and subjected to thorough criticism, it may be well to recall again the reasons for the proposed change. With the establishment of the present circuit courts of appeal to relieve the supreme court of some of its burden of litigation, it was provided that these courts should have exclusive and final appellate jurisdiction in all cases arising under the patent laws, subject only to the qualification that the supreme court might specially order any such case, pending in or decided by any circuit court of appeals, to be sent to it for consideration by writ of certiorari or otherwise. This is a jurisdiction which in the nature of things can be exercised by that court but rarely, and any frequent resort to it would defeat the object of the law. In fact, only ten patent cases have been carried up in this way in sixteen years.

While the law has been thus singularly effective in producing the result aimed at, it has had another effect not foreseen at the time of its enactment. Since our circuit courts of appeal are entirely independent of each other, and show frequent disinclination to co-ordinate or harmonize their opinions, it has resulted that we now have nine final tribunals to determine patent causes, instead of one, as is the case in all other departments of the law. The importance of certainty in patent law is as great as, if not greater than, in general jurisprudence, and although the subject is a highly specialized one and is regarded by most lawyers as outside their field, it is one of great importance to all citizens, for it takes but slight reflection to appreciate our universal dependence upon patented inventions. It is claimed, not without reason, that our marvellous economic development has been largely due to the influence of the monopoly granted to inventors. For the reason, moreover, that the subject is highly specialized and technical, and deals largely with matters susceptible of exact definition, it is peculiarly unfortunate that the opportunity for finality which it affords is not realized. The differences of opinion in the different circuits have already in some important cases resulted in absurdities and injustice, and this tendency is bound to increase if the present situation continues. As the committee says, "the lawyer can tell his client nothing reliable without reference to the decisions of the courts, and with these in conflict,

NEWS ITEM.

AMERICAN BAR ASSOCIATION MEETING FOR 1908.

The annual meeting of the American Bar Association will convene August 25, 1908, at Seat-

the law becomes undiscoverable knowledge; it degenerates from a science to guess-work."

The reasons for the creation of a new court seem, therefore, decisive and the only dispute so far has been as to the method of selection of the judges. The plan proposed in the pending bills is in line with the methods adopted in creation of the circuit courts of appeals, but has some unique features that have caused hesitation. It provides for the selection by the supreme court, from the existing circuit and district judges, of four judges who with a presiding justice, appointed by the president, shall form the court of patent appeals. The four judges designated shall sit for limited periods of six years each, retiring in rotation. The advocates of the plan insist that it is important not only to have judges who have already proved themselves experts in patent questions, but that they should not, by being confined to that narrow subject, lose the breadth of view which comes from consideration of the general problems of litigation. It seems likely, however, that the judges who serve in this court would find their appointments renewed at the end of their terms, and the provision for rotation would be valuable only as a means of gracefully retiring an unsatisfactory member. Objection may be made that this is a departure from the principle of independence due to permanence of tenure which prevails throughout the federal judiciary. Since the designations, however, are to be made by the supreme court, and not by any elective body, it seems unlikely that this possibility should have any effect upon the judges of the proposed court except to stimulate them to devoted service.—The Green Bag.

BOOK REVIEWS.

JOYCE ON INDICTMENTS.

This volume, by Howard C. Joyce, contains 916 pages, and in it the subject is very thoroughly presented from the standpoint of the constitution and statutes, as well as in the light of the common law. Not only is the matter of indictment discussed, but the power and jurisdiction of the grand jury to act is dealt with. Questions are continually arising as to the sufficiency of indictment, etc. While the points raised are almost innumerable, the author presents those general principles by which the sufficiency of the indictment must be determined. Incidentally the new practice of prosecution by information is dealt with. Over 6,000 citations are given, and the forms presented have received judicial sanction. Attorneys practicing in the criminal courts have in this work a treatise which will be of the utmost importance in matters of practice and procedure in relation to indictments. Published in one volume, by Matthew Bender & Co., Albany, N. Y.

TIFFANY ON SALES.

This new edition of Tiffany's excellent work on sales has been revised and much new matter added. Those familiar with the Hornbook Series will understand the general plan of arrangement. The rules and principles are set out in the black-letter text, followed by carefully prepared explanatory statements of the law. Sales is a subject which to-day is of the

utmost importance, owing to the immense volume of commercial transactions governed by this branch of the law. Tiffany's work presents in a very thorough manner the principles of the law of sales; it will be of special value to the student, but the busy practitioner will also find it a very useful book. This new edition contains in the appendix the proposed Sales Act, recommended by the Commissioners on Uniform State Laws, which has been enacted in some states. It is by Francis B. Tiffany, and published by West Publishing Co., St. Paul.

HUMOR OF THE LAW.

O. J. Weeks, a prominent Brooklyn business man, recently asked to be excused from jury duty on the ground, as he stated in a very well written letter, that he objected to the "method of juggling with the law, splitting hairs and granting appeals on any pretext."

A wholesale confectioner of New York, a friend of Mr. Weeks, said the other day:

"A good many Americans, seeing how expeditiously and cheaply cases are handled abroad, and how long, and with what cost to the taxpayers as well as to the contestants, they are dragged out here, will heartily agree with Mr. Weeks. I'm glad he wrote his letter. Our laws do need reforming."

"But Mr. Weeks makes no charge against the judiciary. He doesn't impugn their good faith. It is only the system that he falls upon."

"He told me yesterday he didn't attack the judges. He said he held them in no such suspicion as a Brooklyn chicken thief held a Brooklyn judge last month."

"This judge, he explained, said to the convicted thief:

"What I don't understand, Calhoun, is how it was possible for you to steal those broilers when they were roosting right under their owner's window, and there were two vicious watch dogs in the yard."

"Calhoun chuckled, and answered:

"It wouldn't do yer a bit o' good, Jedge, fo' me to 'splain how I cotched dem chickens, fo' you couldn't do it yo'self if you tried fohty times an' yo' mout git yo' hide chock full er buckshot. De bes' way fo' yo' to do, Jedge, is ter buy yo' chickens in de open mahket, an' when yo' wants ter commit any rascality do it up dar on de bench, whah yo' am at home.'"—New York Sun.

One day a tall, gaunt woman, with rope-colored hair and an expression of great fierceness, strode into the office of a county clerk in West Virginia.

"You air the person that keeps the marriage books, ain't ye?" she demanded.

"What book do you wish to see, madam?" asked the police clerk.

"Kin you find out if Jim Jones was married?"

Search of the records disclosed the name of James Jones, for whose marriage a license had been issued two years before.

"Married Elizabeth Mott, didn't he?" asked the woman.

"The license was issued for a marriage with Miss Elizabeth Mott."

"Well, young man, I'm Elizabeth. I thought I oughter come an' tell ye that Jim has escaped."

WEEKLY DIGEST.

Weekly Digest of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of all the Federal Courts.

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1. **Abandonment—Water Rights.**—Nonuser alone is not sufficient to prove an abandonment; but nonuser coupled with acts showing intention on the part of the owner not to repossess himself may constitute abandonment.—*Alamosa Creek Canal Co. v. Nelson*, Colo., 93 Pac. Rep. 1112.

2. **Abatement and Revival—Action for Rent.**—The pendency of one action for rent held a defense to others involving causes of action which should have been joined therein.—*Drexler v. Cohen*, 108 N. Y. Supp. 680.

3. **Action—Consolidation.**—Where the plaintiffs were different, and two separate causes of action existed, an order consolidating the actions and transferring them to the Supreme Court held unauthorized by Code Civ. Proc. § 817.—*Miller v. Baillard*, 108 N. Y. Supp. 973.

4. **Appeal and Error—Assignment of Error.**—An order to submit two cases on the evidence taken in a third case does not consolidate the cases for trial and appeal, and assignments of error pertaining to the cases not tried cannot be considered on appeal from the case tried.—*La Flitte v. City of Ft. Collins*, Colo., 93 Pac. Rep. 1098.

5. **Cross Examination.**—The limits of a cross-examination are within the discretion of the presiding judge, and his rulings thereon will not be disturbed on appeal in the absence of an abuse of discretion.—*Williamson v. Moss*, S. C., 60 S. E. Rep. 313.

6. **Judgment.**—Though a party against whom a judgment rendered in the common pleas may have been entitled to a directed verdict, he is not on that account entitled to a final judgment in his favor by the reviewing court, unless he requested such instruction.—*Whitaker v. Michigan Mut. Life Ins. Co.*, Ohio, 83 N. E. Rep. 899.

7. **New Parties.**—The granting of a motion to bring in a new party defendant rests in the discretion of the lower court, and, not being a

question of law, cannot be reviewed on appeal.—*Gittleman v. Feltman*, N. Y., 83 N. E. Rep. 969.

8. **New Trial.**—A trial judge may grant a new trial on the ground that the verdict is either unreasonably too large or too small, and the Court of Appeals will interfere only in case of manifest abuse.—*Holland v. Williams*, Ga., 60 S. E. Rep. 331.

9. **Reception of Evidence.**—The admission of testimony in reply rests largely within the discretion of the judge, and his ruling will not be disturbed unless the discretion was abused.—*Wilson v. Moss*, S. C., 60 S. E. Rep. 313.

10. **Reopening Trial.**—The granting of a motion to reopen the trial and permit the introduction of rebuttal testimony is in the discretion of the trial court.—*Hall v. Jensen*, Idaho, 93 Pac. Rep. 962.

11. **Appearance—Jurisdiction.**—If jurisdiction is necessary to the granting of the relief sought by defendant, his appearance is general, regardless of its purpose or character.—*Winter v. Union Packing Co.*, Ore., 93 Pac. Rep. 930.

12. **Assignments—Future Wages.**—In an action for assigned wages, assignee held not required to prove that at the time of notice of assignment wages remained due from defendant to assignor.—*Chicago, B. & Q. R. Co. v. Provolt*, Colo., 93 Pac. Rep. 1126.

13. **Wages.**—An order on an employer to pay to a third person a specified part of a weekly salary until a designated amount had been paid held a mere direction, revocable at the will of the employee.—*Schreiber v. Keller Mechanical Engraving Co.*, 108 N. Y. Supp. 658.

14. **Attorney and Client—Compensation.**—An attorney bringing action under an agreement to receive as compensation a certain percentage of the amount recovered held entitled to such a percentage of the amount which his clients would have been entitled to, had they not dismissed the action before trial.—*Sullivan v. McCann*, 108 N. Y. Supp. 909.

15. **Duty.**—It is the duty of an attorney to observe the rules of courteous demeanor in open court, and to abstain out of court from insulting language towards the judges personally for their judicial acts.—*In re Breen*, Nev., 93 Pac. Rep. 997.

16. **Bail—Nature and Effect of Recognizance.**—A recognizance in a criminal case is in the nature of a judgment confessed of record, and a proceeding thereon by *scil. fa.* after forfeiture is merely to confirm such judgment.—*United States v. Taylor*, U. S. D. C., W. D. Ark., 157 Fed. Rep. 718.

17. **Bankruptcy—Accounting by Trustee.**—On the final settlement of the accounts of a trustee, evidence offered by an objecting creditor to show that the trustee failed to obey an order of the court directing him to proceed before a commissioner to try the title to certain property, and tending to show that assets were thereby lost to the estate, was admissible, and its exclusion was error.—*In re Reinbot*, U. S. C. C. of App., Second Circuit, 158 Fed. Rep. 672.

18. **Discharge.**—A bankrupt who has failed to apply for his discharge within the time limited by Bankr. Act c. 541, § 14a, cannot thereafter file a second petition, and obtain a discharge from the debts which were scheduled and provable in the previous bankruptcy.—*In re Silverman*, U. S. C. C. of App., Second Circuit, 158 Fed. Rep. 675.

19. **Bastards—Bonds.**—For a material variance between the allegations of the accusation and the nature of the proof as to the character of the bond required of the putative father of a bastard the court should grant a new trial.—*Pinson v. State, Ga.*, 60 S. E. Rep. 329.

20. **Persons Entitled to Contest Legitimacy.**—The legitimacy of the children of the wife born during marriage can be contested only by the husband or his heirs in a direct suit.—*Ducasse's Heirs v. Ducasse, La.*, 45 So. Rep. 565.

21. **Benefit Societies—By-Laws.**—Under the evidence and the by-laws of defendant benevolent association, held, that the members had three months from the end of each quarter for paying the dues for such quarter.—*Harr v. Harlem Independent Sick & Benevolent Ass'n*, 108 N. Y. Supp. 1003.

22. **Brokers—Commissions.**—Brokers suing for commissions on an agreement of exchange not consummated must show that they brought the parties to an agreement, and that it was the fault of the party sued that such exchange was not consummated.—*Ernst v. Loeb*, 108 N. Y. Supp. 631.

23. **Commissions.**—Where rival brokers are given property to sell, and one sells it to a customer to whom the other had unsuccessfully tried to sell, held, that the latter was not entitled to commissions.—*Witherbee v. Walker, Colo.*, 93 Pac. Rep. 1118.

24. **Burglary—Possession of Stolen Property.**—The recent and unexplained possession of property stolen from a house proved may be sufficient to authorize a conviction of burglary, but the presumption of guilt arising from such proof is not one of law.—*Cuthbert v. State, Ga.*, 60 S. E. Rep. 322.

25. **Carriers—Baggage Checks.**—Under Rev. St. 1887, § 2674, the liability to furnish a passenger free transportation on failure of a railroad to deliver a baggage check held as much a part of the penalty as the cash penalty therein prescribed.—*Tarr v. Oregon Short Line R. Co., Idaho*, 93 Pac. Rep. 957.

26. **Contracts Enforceable.**—Where the subject matter of a contract is not foreign to the purposes of a railroad, but is within its authorized power, and is not illegal, it will not be nullified by the courts.—*Taylor v. Florida East Coast Ry. Co., Fla.*, 45 So. Rep. 574.

27. **Freight Charges.**—A freight charge made by a common carrier which conforms to the schedule of rates required to be fixed and published by the interstate commerce act is prima facie a reasonable charge.—*Baltimore & O. R. Co. v. La Due*, 108 N. Y. Supp. 669.

28. **Chattel Mortgages—Breach of Contract.**—Where a chattel mortgage is given to secure advancements, and the mortgagee only advances a part of the sum agreed on, the mortgagee may foreclose for the amount due, subject to a set off for the damages from his failure to advance the whole sum.—*Abernethy v. Uhlman, Ore.*, 93 Pac. Rep. 936.

29. **Commerce—Subjects of Regulation.**—Act Feb. 5, 1907 (Laws 107, p. 6, c. 5), is not an interference with interstate commerce prohibited by the constitution.—*State v. Northern Pac. Ry. Co., Mont.*, 93 Pac. Rep. 945.

30. **Conspiracy—Boycott.**—Notices given by members of a labor union which have the effect of exciting reasonable fear, whereby the business of another is affected, are unlawful,

though not accompanied by direct threats.—*Wilson v. Hey, Ill.*, 83 N. E. Rep. 928.

31. **Constitutional Law—Amendments.**—The general provisions of the constitution do not limit conflicting provisions of an amendment to it that are specific and temporary.—*State v. Harris, Ohio*, 83 N. E. Rep. 912.

32. **Regulating Hours of Employment.**—Rights under Const. U. S. Amend. 14, held not infringed by limitation of the hours of labor of women employed in laundries for 10 hours, made by Laws Or. 1903, p. 148.—*Muller v. State of Oregon, U. S. S. C.*, 28 Sup. Ct. Rep. 324.

33. **Contracts—Consideration.**—Where a contract provides for the payment of money in consideration of doing an act which is to be or may be performed after payment, a suit for the money may be maintained before performance of such consideration.—*Gall v. Gall*, 108 N. Y. Supp. 647.

34. **Modification.**—Party to a contract held not entitled to claim that an oral modification made at his request was an abandonment, or that the delay in performance caused thereby discharged him from liability.—*Hills v. McMunn, Ill.*, 83 N. E. Rep. 963.

35. **Performance.**—Where, in a suit on a contract, plaintiff pleads full performance, he may not recover on the theory that his breach of certain terms was waived by defendant.—*Real Estate Directory & Information Bureau v. Turner*, 108 N. Y. Supp. 682.

36. **Copyrights—Musical Compositions.**—Perforated rolls used in connection with mechanical piano players, which produce in sound copyrighted musical compositions, held not to infringe copyright of such compositions, given by Rev. St. U. S. § 4952, (U. S. Comp. St. Supp. 1907, p. 1021).—*White-Smith Music Pub. Co. v. Apollo Co., U. S. S. C.*, 28 Sup. Ct. Rep. 319.

37. **Corporations—Expulsion of Members.**—A bill in chancery for an injunction restraining a corporation not for pecuniary profit from expelling a member for violation of the rules and by-laws of the corporation will not lie; the member's remedy if any being at law.—*Allen v. Chicago Undertakers' Ass'n, Ill.*, 83 N. E. Rep. 952.

38. **Payment of Judgment.**—To compel plaintiff to take in lieu of a money judgment, a certificate of stock, which has greatly depreciated in value, held inequitable; defendant by his appeals having caused the delay in the delivery of the certificate.—*Treadwell v. Clark*, 108 N. Y. Supp. 733.

39. **Refusal of Officers to Act.**—A request to the directors of a corporation to sue to set aside a deed and restore certain property to the corporation held unnecessary on the part of the minority stockholders, before bringing such a suit; the directors having participated in the wrongful conveyance.—*Tillis v. Brown, Ala.*, 45 So. Rep. 589.

40. **Right of Stockholders.**—A court of equity will not interfere in the management of a corporation on the complaint of a stockholder, unless it is based on some illegal or unauthorized act of the majority to his prejudice.—*Colby v. Equitable Trust Co. of New York*, 108 N. Y. Supp. 978.

41. **Courts—Jurisdiction.**—Where a case not within the jurisdiction of the Court of Appeals is lodged in its files, on discovery by such court of its lack of jurisdiction, it will order either that the case be dismissed or transmitted

to the supreme court.—*Dawson v. State, Ga.*, 60 S. E. Rep. 319.

42. **Covenants**—Construction.—Steps projecting about four feet beyond the front line of a dwelling house held not a part thereof within the meaning of a covenant prohibiting the erection of a dwelling house on the property within a certain distance of the front street line.—*Adams v. Howell*, 108 N. Y. Supp. 245.

43. **Criminal Evidence**—Rebuttal.—Prosecuting witness having testified in answer to defendant's counsel that, after swearing out the warrant, he did not return to the preliminary trial for a long time, evidence by the state in rebuttal to explain his stay held competent.—*Boyd v. State, Ala.*, 45 So. Rep. 591.

44. **Criminal Law**—Former Jeopardy.—Where the Supreme Court disbarred an attorney for misconduct in criticising the court, a proceeding to punish him for contempt for the same language will be dismissed.—*In re Breen, Nev.*, 93 Pac. Rep. 1004.

45. **Criminal Trial**—Instructions to Jury.—It will be presumed on appeal, in the absence of a showing to the contrary, that the court in trying a criminal case properly admonished the jury on permitting them to separate before the case was finally submitted to them.—*State v. Walker, S. C.*, 60 S. E. Rep. 309.

46. **Damages**—Pleading.—To justify damages for a condition that did not necessarily and directly result from a personal injury received such damages should be specifically pleaded, so that defendant might have notice thereof and an opportunity to properly litigate the question.—*Johnson v. City of Troy*, 108 N. Y. Supp. 917.

47. **Deeds**—Delivery.—Where two deeds, made at the same time and in furtherance of the same object, were kept together in the same envelope, competent evidence proving the delivery of one of them affords a strong inference that the other deed was also delivered.—*White v. Willard, Ill.*, 83 N. E. Rep. 954.

48. **Discovery**—Claim of Privilege.—A person will not be compelled to submit to an examination, and be forced to claim his privilege, unless it affirmatively appear that there is some fact which will not criminate him and concerning which he is to be examined.—*Ely v. Perkins*, 108 N. Y. Supp. 613.

49. **Divorce**—Annulment.—Remarriage by one forbidden in the decree of divorce, procured by his coercion, to remarry, held not to prevent annulment of the decree.—*Lake v. Lake*, 108 N. Y. Supp. 964.

50. **Domicile**—Evidence.—Neither voting nor registration as a voter is conclusive on the question of domicile.—*Quinn v. Nevills, Cal.*, 93 Pac. Rep. 1055.

51. **Eminent Domain**—Proceedings to Take Property.—In condemnation proceedings, held, that the court, after entry of judgment, could in its discretion permit the filing of a supplementary affidavit remedying a defect in proof of service of notice.—*Spokane Interurban Ry. Co. v. Connelly, Wash.*, 93 Pac. Rep. 1082.

52. **Equity**—Specific Performance.—Equity held to have jurisdiction of a suit to specifically enforce a contract for the purchase of corporate stock on the ground of the inadequacy of the remedy at law.—*Hills v. McMunn, Ill.*, 83 N. E. Rep. 963.

53. **Estates**—Future Estates.—Since livery of seisin is not necessary to a valid conveyance, an estate in fee may be conveyed to commence in the future without the creation of any intermediate estate to support it.—*White v. Willard, Ill.*, 83 N. E. Rep. 954.

54. **Evidence**—Expert Testimony as to Value.—It is unnecessary for an expert witness as to the market value of a particular article of merchandise to be acquainted with the market value of all its component parts.—*Brody v. Birnbaum*, 108 N. Y. Supp. 581.

55.—**Handwriting**.—A witness called to prove handwriting may be asked whether he has seen a particular person write, and whether he believes the paper in dispute to be in his handwriting.—*Tarnofker v. Grissler*, 108 N. Y. Supp. 696.

56.—**Hypothetical Questions**.—A question intended to elicit the opinion of an expert as to the condition of the roof of an entry in a coal mine as to whether the roof was dangerous or otherwise should fairly include the facts shown by the evidence affecting the opinion.—*McCarthy v. Spring Valley Coal Co., Ill.*, 83 N. E. Rep. 957.

57.—**Presumptions**.—The presumption of sanity and evidence that testatrix acted in a rational manner at the time the will was executed held sufficient to make a prima facie case of testamentary capacity.—*In re Johnson's Estate, Cal.*, 93 Pac. Rep. 1015.

58.—**Written Contract**.—Where defendant had opportunity to read a mortgage note, but signed it without reading it, and it did not contain the contract as made, it is no ground for the introduction of parol evidence to vary its terms.—*Branan v. Warfield & Lee, Ga.*, 60 S. E. Rep. 325.

59. **Executors and Administrators**—Checks by Testator.—The executrix of an administrator who came into possession of a check made by her testator as administrator held liable to pay over, not merely the check, but the money represented thereby.—*In re Collier*, 108 N. Y. Supp. 600.

60.—**Payment of Claims**.—An option to pay a note by delivery of corporate stock held not to expire with maker's death, but to survive to his estate.—*In re Vance's Estate, Cal.*, 93 Pac. Rep. 1010.

61. **Federal Courts**—Jurisdiction.—The provisions of the fourteenth constitutional amendment securing personal rights are directed against the states and their agencies, and not against the acts of private individuals which give no right of action in the federal courts on the ground that a constitutional question is involved.—*Marten v. Holbrook, U. S. C. C., N. D. Cal.*, 158 Fed. Rep. 716.

62. **Fire Insurance**—Time for Proving Loss.—A provision in an insurance contract which, among other things, made the presenting of proof of loss within 60 days after a fire a condition precedent to any action on the policy, held valid and enforceable.—*San Francisco Sav. Union v. Western Assur. Co. of Toronto, U. S. C. C., N. D. Cal.*, 158 Fed. Rep. 695.

63. **Forgery**—Information.—An information for forgery need not show how a person could have been defrauded, where the instrument is one the forgery of which is prohibited, and appears to be one that might work a fraud.—*People v. Johnson, Cal.*, 93 Pac. Rep. 1042.

64. Fraudulent Conveyances—Burden of Proof.—In a suit by a creditor of a husband to set aside conveyances of property by the husband to his wife, the burden is on the husband and wife to clearly establish that the transaction was not fraudulent.—*Helm v. Brewster*, Colo., 93 Pac. Rep. 1101.

65.—Relief Against Transferee.—A judgment setting aside a transfer of personal property as in fraud of creditors held improper, in so far as it charged the transferee with the value of the use of the property.—*Hosmer v. Tiffany*, 108 N. Y. Supp. 943.

66. Garnishment—Judgment.—A judgment may be adjudged against garnishee prior to judgment against defendant, but such adjudication is not a final judgment, which can only be entered after judgment against defendant.—*Nashville, C. & St. L. Ry. v. Brown*, Ga., 60 S. E. Rep. 319.

67. Highways—Appointment of Commissioner.—Where the concurrence of four members of a town board is essential to an appointment of a highway commissioner, no valid appointment is made by a concurrence of four members of whom the appointee is one.—*In re Kerr*, 108 N. Y. Supp. 591.

68. Husband and Wife—Debts of Wife.—In an action against a married woman, that plaintiff had demanded payment from her husband is a circumstance to be considered in determining to whom credit was extended.—*Blendermann v. Mann-Wray*, 108 N. Y. Supp. 700.

69.—Separate Community Property.—Property deemed to a husband as a gift or in exchange for separate property held to be his separate property.—*Holly St. Land Co. v. Beyer*, Wash., 93 Pac. Rep. 1065.

70. Infants—Note of Infants.—If an infant and an adult having separate farms buy on a joint note fertilizers for the farm of each, and the minor pays for the portion used on his farm, he cannot be held further on the note.—*James v. Sasser*, Ga., 60 S. E. Rep. 329.

71. Injunction—Trade Unions.—The law allows laborers to combine to obtain lawful benefits for themselves, but it sanctions no combinations, either of employers or employed, which have for their immediate purpose the injury of another.—*A. R. Barnes & Co. v. Chicago Typographical Union No. 16*, Ill., 83 N. E. Rep. 940.

72.—Validity.—A defendant cannot refuse to obey an injunction, however improvidently or erroneously granted, but he is bound, at his peril, to obey it while it remains in force.—*A. R. Barnes & Co. v. Chicago Typographical Union No. 16*, Ill., 83 N. E. Rep. 932.

73. Interest—Money Wrongfully Withheld.—The failure of a sheriff to pay redemption money to his successors on the expiration of his term of office was not ground upon which to charge him with interest for the time he held the funds as sheriff.—*Strauss v. Gilbert*, Ill., 83 N. E. Rep. 946.

74. Intoxicating Liquors—Illegal Sale.—To relieve one who in a prohibition county has accepted money and shortly afterwards has delivered whisky to another from the presumption that he is the seller, the fact of his agency for the buyer must be shown.—*Shaw v. State*, Ga., 60 S. E. Rep. 326.

75.—Unlawful Sale.—In a trial for unlawfully selling intoxicants, evidence as to collateral matter held proper as tending to show

when the sale was made.—*Sweat v. State*, Ala., 45 So. Rep. 588.

76.—Violation of Prohibitory Law.—The provision in the constitution prohibiting the manufacture, sale, barter or giving away of any intoxicating liquors, including ale, beer and wine, held valid and self-executing.—*Ex parte Cain*, Okl., 93 Pac. Rep. 974.

77. Judgment—Conclusiveness.—Where an ordinance authorizing a public improvement is valid and sufficient to give the court jurisdiction, the judgment of confirmation is in full force until reversed, and cannot be attacked collaterally.—*Gage v. City of Chicago*, Ill., 83 N. E. Rep. 663.

78.—Conclusiveness.—A judgment refusing to revoke the appointment of one as administrator of decedent, and refusing to appoint the alleged widow of the decedent, held a final judgment, and bars her from objecting to the administrator's account.—*In re McGoughran*, 108 N. Y. Supp. 934.

79.—Conclusiveness.—All questions determined by a decree, adjudicating water priorities affirmed on appeal, is res judicata, for the purpose of a subsequent suit against appellant and another to enjoin them from taking more water than they are entitled to under one of the priorities.—*Kerr v. Burns*, Colo., 93 Pac. Rep. 1120.

80. Justices of the Peace—Amendment of Judgment.—A judgment in a justice's court against defendant and garnishee jointly cannot by amendment be converted into one against defendant, and another against garnishee.—*Nashville, C. & St. L. Ry. v. Brown*, Ga., 60 S. E. Rep. 319.

81. Landlord and Tenant—Action for Rent.—The fact that a tenant retained possession of leased premises after the landlord failed to supply heat as covenanted in the contract of lease was no bar to her counterclaim in an action for rent for damages sustained by reason of the landlord's breach of covenant.—*Borchardt v. Parker*, 108 N. Y. Supp. 585.

82.—Cropping Contracts.—A lessor and lessee under a cropping contract being tenants in common in the crop, a mortgagee of the lessee's interest, in order to claim any interest against the lessor, must fulfill the lessee's contract.—*Abernethy v. Uhlman*, Ore., 93 Pac. Rep. 936.

83.—Lease of Hotel.—The lessee of a building used as a hotel has a right to set up new business in the same vicinity, provided he does not destroy or damage the old business.—*Steward v. Denechand*, La., 45 So. Rep. 56.

84.—Right of Sub-Tenant.—A sub-tenant in dispossess proceedings has no better standing than the tenant, as he must be held to have taken the lease with constructive knowledge of the situation between the landlord and the tenant.—*Park Laundry Co. v. Sassone*, 108 N. Y. Supp. 725.

85. Larceny—Evidence.—Evidence that B. and C. had been previously arrested for stealing a heifer belonging to defendant, and the proceedings in such prosecution, held admissible on the issue of defendant's intent in taking the heifer from C's pasture.—*People v. Cain*, Cal., 93 Pac. Rep. 1037.

86. Licenses—Gas Companies.—A \$100 monthly license tax by a city upon gas companies, regardless of the business done and the earnings, held not to infringe Const. art. 13, § 1.—*City of Los Angeles v. Los Angeles Independent Gas Co.*, Cal., 93 Pac. Rep. 1006.

87.—**Revocation.**—Licensees, held entitled to notice of revocation of the license by the landowner granting it and to a reasonable time thereafter to remove any structure erected by them under the license.—*In re Trustees of Village of White Plains*, 108 N. Y. Supp. 596.

88. **Lien.**—**Loss of Lien.**—A lien claimant for money advanced for improvement of leased premises held to have acquiesced in the renewal of the lease, and continued the lien subject to the rights of the lessor.—*Hughes v. Ker-show, Colo.*, 93 Pac. Rep. 1116.

89. **Mandamus.**—**Illegal Removal from Office.**—Mandamus is the proper remedy to restore a party to an office from which he has been illegally removed.—*State v. Baldwin, Ohio*, 83 N. E. Rep. 907.

90.—**Nature of Action.**—Where mandamus is invoked for the protection of the purely private right of the applicant, the proceedings may be conducted in the names of the real parties in interest.—*Merrill v. Suffa, Colo.*, 93 Pac. Rep. 1099.

91. **Marine Insurance.**—**Transfer of Cargo.**—A transfer of part of a cargo of a vessel to another vessel to lighten the former owing to low water in a river held not to invalidate a policy of insurance on such cargo.—*St. Paul Fire & Marine Ins. Co. v. Pacific Cold Storage Co.*, U. S. C. C. of App., Ninth Circuit, 158 Fed. Rep. 625.

92. **Master and Servant.**—**Contributory Negligence.**—The questions of negligence, contributory negligence, and assumption of risk held properly submitted to the jury in an action against a master to recover for the death of a servant.—*Pennsylvania Steel Co. v. Jacobsen*, U. S. C. C. of App., Second Circuit, 158 Fed. Rep. 656.

93.—**Duty to Warn.**—It is the duty of a master employing a 14-year-old girl to work near machinery to warn her of any danger, and it is her duty to observe the instructions, and, in the absence of knowledge that she is not, the master may assume that she is conforming to them.—*Civetti v. American Hatters' & Furriers' Corp.*, 108 N. Y. Supp. 663.

94. **Monopolies.**—**Combination in Restraint of Commerce.**—A combination by members of a labor union to destroy existing interstate traffic in hats by preventing the manufacturer by a boycott from manufacturing hats for transportation beyond the state held a combination in restraint of trade or commerce among the several states within Anti-Trust Act, c. 647, 26 Stat. 209, the members of which are liable to treble damages recoverable under section 7.—*Loewe v. Lawlor, U. S. S. C.*, 28 Sup. Ct. Rep. 301.

95. **Municipal Corporations.**—**Excavations in Roadway.**—Where an excavation was made in a street under supervision of the city inspector, the city cannot escape liability for an accident on account thereof, because it had not time to remedy the same.—*Newman v. City of New York*, 108 N. Y. Supp. 676.

96.—**Removal of Policeman.**—A police officer, who when on trial before the deputy police commissioner, spoke to him in an insolent manner, held guilty of conduct warranting his dismissal.—*People v. Bingham*, 108 N. Y. Supp. 933.

97.—**Torts.**—The legislature can require that one injured by defect in a street must give notice of his injury before holding the municipal

pality liable.—*City of Colorado Springs v. Neville, Colo.*, 93 Pac. Rep. 1096.

98. **Negligence.**—**Action Against Joint Tortfeasors.**—In an action against a subway railway company, a subway construction company, and a cable and conduit company, certain evidence held admissible as tending to relieve the railway company from negligence.—*Draper v. Interborough Rapid Transit Co.*, 108 N. Y. Supp. 691.

99.—**Assumption of Risk.**—Plaintiff employed to inspect the steel work of a building as it was completed by the sub-contractor, held not entitled to recover against such subcontractor for injuries received because of a defect therein.—*McClelland v. Gerrick, Wash.*, 93 Pac. Rep. 1087.

100. **Partition.**—**Riparian Rights.**—A decree partitioning lands riparian to streams and the waters thereof held not to affect the right to underground waters essential for the preservation of surface streams.—*Verdugo Canon Water Co. v. Verdugo, Cal.*, 93 Pac. Rep. 1021.

101. **Perpetuities.**—**Gifts to Parties.**—The statute prohibiting accumulations of income, except for infants, held to apply to implied accumulations, as well as express ones.—*St. John v. Andrews Institute for Girls, N. Y.*, 83 N. E. Rep. 981.

102. **Principal and Agent.**—**Estoppel to Question Authority.**—A purchaser of corporate stock from an agent acting under a power of attorney held estopped to raise the question that the power was not broad enough to permit of a modification of a contract.—*Hills v. McMunn, Ill.*, 83 N. E. Rep. 963.

103.—**Sale of Goods on Commission.**—A contract for sale of "any or all" of a certain stock of goods on commission construed and held to create merely an agency at will, revocable by either party on performance of the obligations up to its termination.—*Winslow v. Mayo*, 108 N. Y. Supp. 640.

104. **Prohibition.**—**Violating Sunday Laws.**—On an application for a writ to prohibit a justice from granting a petition to revoke theatrical license, the only question is whether the justice has jurisdiction to make the order.—*People v. O'Gorman*, 108 N. Y. Supp. 737.

105. **Railroads.**—**Right of Way.**—Where the owner of land conveyed it to a railroad for a right of way of its main line, and the corporation violates its agreement to maintain a spur track and depot, the grantor cannot enjoin the running of trains over the main line.—*Taylor v. Florida East Coast Ry. Co., Fla.*, 45 So. Rep. 574.

106.—**Street Crossing Accident.**—If an engineer did not see one crossing the track until she was in danger, and then could have avoided injuring her, he was negligent, though she was primarily negligent.—*Zipperlen v. Southern Pac. Co., Cal.*, 93 Pac. Rep. 1049.

107. **Set-Off and Counterclaim.**—**Cross Action.**—In an action to recover money paid defendant to construct a machine, defendant was not compelled to plead a cause of action for services and materials furnished as a counterclaim, but was entitled to bring a cross-action therefore in the Municipal Court.—*Miller v. Ballard*, 108 N. Y. Supp. 973.

108. **Specific Performance.**—**Contracts Enforceable.**—Where a railroad company accepts a deed conveying a right of way, any valid agreement in the deed is binding on the railroad, though it did not sign the deed, and may

be specifically enforced.—*Taylor v. Florida East Coast Ry. Co., Fla., 45 So. Rep. 574.*

109.—Evidence.—In specific performance, it was error to refuse to allow a defendant, who had recognized the contract after the time limit, to be cross-examined with reference to such matter.—*Kessler v. Prulitt, Idaho, 93 Pac. Rep. 965.*

110. **Street Railroads**—Collisions.—In an action for injuries to a horse and carriage in a collision with a street car, the question whether the motorman acted within the scope of his employment held for the jury.—*Ahrens v. Union Ry. Co., 108 N. Y. Supp. 590.*

111.—Contributory Negligence.—In an action against a street railroad company for personal injuries received while driving on the tracks, such driving on the track and the condition of the snow at the switch was the direct and proximate cause of the accident.—*Müller v. Boston & N. St. Ry. Co., Mass., 83 N. E. Rep. 990.*

112.—Negligence.—A traveler making use of a street with reliance on the observance of ordinary care by operators of an approaching car held not negligent.—*Frank J. Lennon Co. v. New York City Ry. Co., 108 N. Y. Supp. 995.*

113.—Status as Passenger.—A street car passenger held not to have lost his status as a passenger, defeating recovery from the company for an assault by the motorman and the conductor.—*Miller v. Brooklyn Heights R. Co., 108 N. Y. Supp. 960.*

114. **Taxation**—Delinquent Taxes.—Where a delinquent list is void because not having attached an affidavit required by Code 1906, § 843, a deed from the clerk of the county court for real estate sold under such delinquent list, held void.—*Devine v. Wilson, W. Va., 60 S. E. Rep. 351.*

115.—Tax Sales.—A county cannot purchase land at a tax sale unless expressly authorized to do so, and a strict compliance with the statute is necessary in order to divest the owner of title thereto.—*Rush v. Lewis and Clark County, Mont., 93 Pac. Rep. 943.*

116. **Tender**—Keeping Tender Good.—Where defendants made a written offer to pay plaintiff more than was due him, but only deposited with clerk a sum less than the plaintiff was entitled to recover, the tender was not kept good.—*Anderson v. Griffith, Ore., 93 Pac. Rep. 934.*

117. **Torts**—Defenses in General.—An act naturally innocent, when done with actual malice, and followed by injury, is not excused because the act might be excused under other conditions.—*A. R. Barnes & Co. v. Chicago Typographical Union No. 16, Ill., 83 N. E. Rep. 940.*

118. **Trade Unions**—Authority of Officers.—Agreement between committees representing central organization of employers and a like committee of a central union held not ratified by a subordinate union.—*Fell v. Berry, 108 N. Y. Supp. 669.*

119. **Trial**—Direction of Verdict.—Though plaintiff failed to prove his case, it was error to direct a verdict for defendant where the evidence was insufficient to justify such verdict. Under such circumstances, the court should have dismissed the complaint.—*Rothenberg v. Rosenberg, 108 N. Y. Supp. 678.*

120. **Trusts**—Construction.—A wife's divorce and her husband's subsequent marriage to a third party held not to determine a trust in

her favor, and expressly created to last during the life of her husband.—*Pelton v. Macy, 108 N. Y. Supp. 713.*

121. **Vendor and Purchaser**—Rescission of Contract.—Mistake by alleged agent of vendor in relation to representation as to rental value of property to be sold held not to justify rescission of contract subsequently made by vendor.—*Rothstein v. Isaac, 108 N. Y. Supp. 896.*

122.—Tender of Payment.—Where a purchaser of real estate tenders to the bank holding a deed in escrow a check for the balance of the price which the bank offers to cash, the tender is sufficient.—*Kessler v. Prulitt, Idaho, 93 Pac. Rep. 965.*

123. **Venue**—Demand for Change.—The court may grant a motion for change of venue for the convenience of witnesses, although no demand for such change has been made.—*Cronin v. Manhattan Transit Co., 108 N. Y. Supp. 963.*

124. **Waters and Water Courses**—Abandonment.—Plaintiff seeking to enjoin the diversion of water by an irrigation ditch must prove an alleged abandonment of priorities awarded thereto by a prior decree.—*Alamosa Creek Canal Co. v. Nelson, Colo., 93 Pac. Rep. 1112.*

125.—Estoppel.—One embarking with others in a common enterprise held to owe to the others the duty, where he proposes to reserve a part of the benefit to himself exclusively, to inform the others in regard thereto, or he will be estopped from asserting his claim.—*Verdugo Canon Water Co. v. Verdugo, Cal., 93 Pac. Rep. 1021.*

126.—Injunction.—To establish the right to an injunction to restrain the taking of water, it is not necessary that plaintiff should be able to prove the extent of his injury with absolute precision.—*Verdugo Canon Water Co. v. Verdugo, Cal., 93 Pac. Rep. 1021.*

127.—Non-User of Water Rights.—Mere nonuser of a water right does not show abandonment thereof. Facts and circumstances showing an intention to abandon must appear.—*In re Daly, 108 N. Y. Supp. 635.*

128. **Wills**—Construction.—The rule that, where there are no words importing a gift other than a direction to the executors to divide or pay at a future time, the legacy is contingent, and does not vest until that time arrives, held not generally applicable where the gift is to legatees by name.—*Crawford v. Engram, Ala., 45 So. Rep. 584.*

129.—Noncupative.—Where, in the presentation form testator has heard the will read and has declared it to be his will, that some of the clauses were inserted by the amanuensis without dictation by the testator held insignificant.—*Ducasse's Heirs v. Ducasse, La., 45 So. Rep. 565.*

130. **Witnesses**—Competency.—Under Civ. Code 1895, § 5269 (1), the party to suit by or against personal representative is not competent to testify to the non-existence of transactions or communications alleged to have taken place between him and the deceased.—*Webb v. Simmons, Ga., 60 S. E. Rep. 334.*

131.—Competency.—In an action by devisees to set aside a deed executed by the testator on the ground that it was not delivered, the widow being deprived of her dower if the deed was upheld, is competent to testify to the delivery of the deed.—*White v. Willard, Ill., 83 N. E. Rep. 954.*

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CUJUS EST INSTITUERE EJUS EST
ABROGARE.

The total lack of the qualification on the part of judges in the understanding of the fundamentals so constantly appearing in so many of the decisions of our various courts of appeal, which we have so often from time to time shown, makes it a part of a journal's duty to call attention to the failure in legal education to so ground the learner in the fundamental principles of the law as to develop that greatest quality of the lawyer or judge: ability in construction.

A case which shows this kind of construction is that of *Hill v. Mundy*, 89 Ky. 36. There, a hotel property was sold in April. An ice-house was upon the premises, which, at that time, was nearly full of ice. Nothing was said as between the parties as to the ice.

The court quoted from 2 Kent, side page 343, as follows: The character of the property, whether personal or real, in respect to fixtures, is governed very much by the intention of the owner and the purposes to which the erection was to apply." Citing 1 Parsons on Contracts, p. 431. "As between vendor and vendee, the law leans to the latter, and he may be entitled to an article as a fixture, although it is not permanently annexed to the realty." The court then went on to consider the nature of the undertaking, saying: "Turning from this general notice of the law of fixtures to the case in hand, we find the property sold was a hotel, for the use of which ice is almost, if not quite, indispensable. The sale

was made when summer is at hand, and when a removal of the ice would have resulted in great waste, if not in total loss. The vendor of the property made no reservation of it, or of any right to enter upon the property to use and enjoy it, or to attend to its preservation, if necessary. Under these circumstances it is reasonable to conclude that it was stored there, to be enjoyed and used by those who might have had the right to use and enjoy the freehold, and was therefore a part of it by the intention as to its use and enjoyment, but that the parties to the sale expected and understood, at the time of the purchase, that it would pass with the premises and by the conveyance. We must presume against the vendor, and as it could not be well removed from the ice-house at that season of the year, save by the small quantity, and as used, he certainly would have reserved the right to enter upon the premises and take it away if he had so expected and intended. . . . The purchaser, owing to the nature of the article, and all the circumstances we have alluded to, had a right, by reason of the silence of the vendor, to consider as he undoubtedly did, that the ice passed to him with the freehold." Here was a case which, judged without the careful consideration of the rules of construction, would have been decided for the plaintiff. It was apparent that, in the very nature of the transaction, the ice was intended to have passed with conveyance. The court found rules by which to carry out this evident intention. The first thing a judge ought to do in the consideration of a case is try to discover the means of doing justice in those cases where it is plainly ascertainable. By a thorough understanding of the rules of construction there is no excuse, as a general rule, for a failure of justice. Common

right and reason must be considered in the process to justice, as was said by Lord Coke when chief justice of the King's Bench, to declare as he did in *Dr. Boham's case*, 8 Co. 118, "that the common law doth control acts of parliament, and adjudge them void, when against common right and reason." Says Kent: "The same sense of justice and freedom of opinion led Lord Chief Justice Hobart, in *Day v. Savage*, Hob. 87, to insist that an act of parliament made against natural equity, as to make a man judge in his own case, was void, and induced Lord Chief Justice Holt to say in the case of the *City of London v. Wood*, *Bacon's Works* 6, p. 128, that the observation of Lord Coke was not extravagant, but was a very reasonable and true saying." It is a fine piece of construction by which Portia, in *The Merchant of Venice*, circumvents the designs of Shylock and avoids the penalty of the bond. Says Mr. Hughes in his work on procedure, under the head of construction: "Wherever it appears that a constructionist does not understand subject matter, then weighty reason appears why he is not a good authority. Consequently one must apprehend the nature of subject matter to construe in reference to it." For instance, he cites the general rule of contracts that both sides are bound or neither; but an adult contracting with an infant binds himself, and not the infant. The failure of courts to understand the essential rules of construction, and often the failure to apprehend the subject matter, is working such universal havoc with our jurisprudence that the need of some work, which will point out the true rules, and so contrast the cases which are decided right on principle with those which are wrong, that the busy judges and lawyers may find a haven in which to escape the storm of citations, which is rushing on them with ever increasing force.

Lex non exakte definit sed arbitrio boni viri permittit, is another maxim intimately related to the subject of this article and is manifest in the foregoing.

NOTES OF IMPORTANT DECISIONS

LANDLORD AND TENANT—PERSONAL INJURIES DUE TO DEFECTIVE PREMISES WHERE CONDITION OF PREMISES IS MISREPRESENTED TO TENANT.—The recent case of *Williams v. Goldberg* (N. Y.), 109 N. Y. Supp. 15, is an action to recover damages for physical injuries sustained by the plaintiff in consequence of the willful misrepresentation and deceit of defendant's agent. The trial resulted in a judgment for plaintiff who was a monthly tenant of certain rooms in defendant's premises. After the recommencement of the term and before its expiration, on the occasion of defendant's agent's call for the rent, plaintiff directed the agent's attention to the decrepit and threatening condition of the ceiling in one of the rooms, expressing her apprehension of injury therefrom and her intention to vacate the rooms. The agent assured her that he had had the ceiling examined and tested and that it had been found to be secure. Later, during the same term, the ceiling fell upon the plaintiff, who, relying upon these assurances had remained in the occupancy of the rooms, causing physical injuries to her. Upon the trial it appeared that the ceiling had not been inspected or tested and the agent's representation that it had, were knowingly untrue as a matter of fact, and so the court below found.

The court held that an action for damages for fraud and deceit does not necessarily rest in any actual or contemplated contractual relation of the parties, and depends "upon the fact that an injury has been suffered resulting in damages to the party seeking redress, and that such damages are the legitimate consequence of the fraud." Citing *N. Y. Land Imp. Co. v. Chapman*, 118 N. Y. 288, 294, 23 N. E. Rep. 187, 189. The court says: "Here the plaintiff was induced by means of the misrepresentations to refrain from herself repairing the ceiling, vacating the rooms, or otherwise providing for her protection, in either of which events, she would have been secure from injury. All manner of fraud is abhorrent to the law, and if one person sustains injury through the fraud of another, he will be afforded a proper remedy. True, the plaintiff's injuries were not the immediate result of the defendant's agent's deceit, but of an intervening cause, the fall of the ceiling. They were, however, the indirect result of the deceit, a natural and probable effect of the agent's wrongful conduct, one against which the fraudulent assurances were made, and from which the plaintiff expected to escape in her reliance upon such assurances. Her damages, therefore, were proximate,

though only consequential to the fraud. Citing *Hale on Damages*, 39; *Sandford v. Handy*, 23 Wend. 263; *Nowack v. Metropolitan St. Ry. Co.* 166 N. Y. 433, 60 N. E. Rep. 32, 54 L. R. A. 592, 82 Am. St. Rep. 691.

A dissenting opinion by MacLean, J., holding that neither an express warranty nor covenant to repair was shown, and that the danger was as apparent to plaintiff as to defendant's agent, and, further, that if an inspection had been made, as represented by defendant's agent, she would have known of it, and therefore she was bound to know that no inspection had in fact taken place. He holds that the judgment should have been reversed.

This case presents a phase of the law of landlord and tenant which is undoubtedly undergoing a transition. The dissenting opinion presents very correctly the older view. It has been said that the law of landlord and tenant was law for the benefit of the landlord alone. In the dissenting opinion it is held that as there was neither an express warranty nor a covenant to repair, the plaintiff was not entitled to recover, stating that in order to recover she must prove representation, falsity, scienter, deception, and injury, and that the absence of any of these conditions is fatal to a recovery, and further that where misrepresentation is relied on that unless the facts represented are matters peculiarly within the knowledge of the landlord or his agent that a recovery cannot be had.

The doctrine laid down by the majority is one that is undoubtedly gaining ground and which is founded upon reason and justice. It is hard to understand why a landlord should be permitted to make false representations, which are relied on by the tenant to his injury, and then escape all liability because no express warranty or covenant to repair can be shown by the tenant.

JUDGMENT — DISTINCTION BETWEEN LAW OF THE CASE AND RES JUDICATA.—In *Alerding v. Allison* (Ind.), 83 N. E. Rep. 1006, the distinction between law of the case by former decision and res judicata is pointed out as follows: The doctrine of "the law of the case" which, as referring to the decisions of the court in a particular case on a former appeal, is analogous to the doctrine of former adjudication, but much more limited in its application. Under the rule of former adjudication, when a cause has been finally determined by a competent tribunal, all questions of controversy arising in the case must be taken as at rest forever, not only the things that were actually adjudged, but every other matter which the parties might have litigated under

the issues formed. *Fischli v. Fischli*, 1 Blackf. 360, 12 Am. Dec. 251; *Guthell v. Goodrich*, 160 Ind. 92, 95, 68 N. E. Rep. 466. The rule known as "the law of the case," while as conclusive as in former adjudications as to all matters within its scope, cannot be invoked, except as to such questions as have been actually considered and determined in the first appeal. In the application of this rule courts will take cognizance of such points only as affirmatively appear in the last to have been decided in the former appeal. "The rule," as said in a California case, "being one which tends to prevent the judicial consideration of a particular controversy, is not to be extended beyond the exigencies which demand its application." Citing among others the case of *Dodge v. Gaylord*, 53 Ind. 365. Continuing, the court says: In the *Dodge* case, *supra*, it is said: "It is also settled that the decision of the supreme court rendered upon a given state of facts becomes the law of the case as applicable to such facts, and, if the cause be reranded for a new trial, the parties have the right to introduce new evidence and establish a new state of facts, and when this is done the decision of the supreme court ceases to be the law of the case, and the court in the trial of such case is not bound by such decision, but should apply the law applicable to the new and changed state of facts." In the *Krug* case, *supra*, it is said: "The rule 'of the law of the case' thus limited to points considered, and on the first appeal meets our full approval; but we cannot agree to the claim of appellee's counsel that 'the law of the case' precludes us from considering and deciding now, on the second appeal of this cause, questions which might have been, but were not, considered and decided as the case was presented on the first appeal. Such claims seem unreasonable, although we are aware supported by many respectable authorities, and even by the language used in some of the reported cases of this court." In the *Wine* case, 158 Ind., it is said on page 391, 63 N. E. Rep. 760: "Only points decided become the law of the case. The record in the appeal to the appellate court, and the opinion pronounced therein, will be regarded as a part of the record in this appeal so far as it will enable the court to ascertain whether the questions now presented were decided by the court in the former appeal. *Westfall v. Wait*, 165 Ind. 353, 359, 73 N. E. Rep. 1089; *Mining Company v. Andrews*, 28 Ind. App. 496, 63 N. E. Rep. 231. As relating to the first three propositions, the evidence submitted in this appeal is, in substance, the same as that submitted in the first appeal, and the law as declared by the appellate court as ruling those points must now be accepted as conclusive.

At the outset it should be borne in mind that the 'law of the case' rule has reference to questions of law, and not to questions of fact. The term means nothing more or less than the application of that line or rule of decision which courts have from time immemorial applied to like pleadings, or like facts, or sets of facts."

JUDICIAL NOTICE—NURSERY REGULATIONS—CONSTITUTIONAL LAW.—It is held in the recent case of *Ex parte Hawley* (S. D.), 115 N. W. Rep. 93, that courts will take judicial notice of the fact that trees and other forms of plant life are subject to destructive communicable disease. The decision construes a statute providing that before any person could sell trees in South Dakota, he must secure a permit, etc. The object of the law being to provide for a system of inspection to prevent the sale of diseased trees. The court says:

"It is a matter of common knowledge of which this court may take judicial notice that trees and other forms of plant life are subject to destructive communicable diseases. *State v. Main*, 69 Conn. 123, 37 Atl. Rep. 80, 36 L. R. A. 623, 61 Am. St. Rep. 30. Diseases in plants have existed as long as plants themselves,—ages before the advent of man. In the earliest historical records, as well as in early Greek and Roman times, some of the more destructive diseases of plants, like rust and mildew or blight of cereals, were widely known and discussed; and, though formerly unreliable theories on the subject may have received more or less general recognition, the recent exhaustive researches of distinguished specialists have placed the pathology of plants on a foundation scarcely less scientific and satisfactory than that occupied by the pathology of animals. *Ency. Americana*, Diseases in Plants. This being so, the power to prescribe regulations calculated to prevent the spread of diseases among plants cannot be less ample than the power to prescribe regulations calculated to prevent the spread of diseases among domestic animals. Concerning the latter the Supreme Court of the United States has said: 'Now, it is said that the defendant has a right under the Constitution of the United States to ship live stock from one state to another state. This will be conceded on all hands; but the defendant is not given by that instrument the right to introduce into a state, against its will, live stock affected by a contagious, infectious, or communicable disease, and whose presence in the state will or may be injurious to its domestic animals. The state—Congress not having assumed charge of the matter as involved in interstate commerce

—may protect its people and their property against such dangers, taking care always that the means employed to that end do not go beyond the necessities of the case, or unreasonably burden the exercise of privileges secured by the Constitution of the United States.' *Reld v. Colorado*, 187 U. S. 137, 23 Sup. Ct. Rep. 92, 47 L. Ed. 115. The authority of a state Legislature to establish reasonable regulations for the prevention of diseases injurious to domestic animals or plants cannot be questioned. Therefore the provision of the statute under discussion, requiring a certificate from a competent entomologist, being manifestly intended and calculated to prevent the sale and distribution of diseased nursery stock, applicable alike to resident and nonresident dealers, and one which does not go beyond the necessities of the case, or unreasonably burden the exercise of privileges secured by the state or federal constitution, such provision conflicts with no principle of constitutional law, and its validity must be sustained. As an incident to its power to enact valid inspection laws, a state may impose a reasonable charge for the purpose of defraying the expenses of inspection. 17 Am. & Eng. Ency. Law, 81."

The statute was held constitutional, and the petitioner, who had been arrested under the provisions of the act was remanded to the custody of the sheriff.

ASSIGNMENTS—MODE AND SUFFICIENCY—EQUITABLE ASSIGNMENT.—In *Smedley v. Speckman*, 157 Fed. Rep. 815, it is held that a mere promise, although of the clearest and most solemn kind, to pay a debt out of a particular fund, is not an assignment of the fund, even in equity; but, to make an equitable assignment, there should be such an actual or constructive appropriation of the subject matter as to confer a complete and present right on the assignee, even where the circumstances do not admit of its immediate exercise and to divest the assignor of control over the fund.

The action was brought by the trustee of a bankrupt estate to recover \$5,000 which the bankrupt had paid within four months of the bankruptcy proceedings to one of his creditors, the trustee alleging that at the time of the payment, Pierson (the bankrupt), was insolvent, and that the creditors receiving the fund had knowledge or reasonable cause to believe that a preference under section 60a as amended, was intended by Pierson. It was contended that the payment complained of was made pursuant to an arrangement between Pierson and Smedley long prior to and not within the four months preceding the filing of said petition, and that said arrangement amounted to an

equitable assignment of five thousand four hundred dollars out of a certain fund to become due from the government on account of work done by Pierson, and that, therefore, the transfer complained of was really made at the time of the said equitable assignment and more than four months before the filing of the petition in bankruptcy. From the evidence the court states that the arrangement amounted to nothing more than an assurance on Pierson's part that he would be in funds soon, at the time of the settlement with the government, and that their account would be paid them then. This, the court states, was a mere promise on Pierson's part and an assurance to his creditors of his ability to keep it. The evidence also shows that the government agent had stated to the creditor that the amount of money mentioned would be due. Nothing further is shown, however, in the way of an assignment, except that when the payment was made it was made by check to Pierson's order and then when entirely beyond the control of Heath, the government agent in charge of the work, was indorsed over by Pierson to Smedley. As to whether this constituted an equitable assignment or not, the court comments as follows:

"This testimony falls far short of evidencing the absolute appropriation by the assignor of the fund sought to be assigned, which is a fundamental requisite of a valid assignment, nor is there any evidence of that surrender by the assignor of all control over the fund that the law requires. A mere promise, though, of the clearest and most solemn kind, to pay a debt out of a particular fund, is not an assignment of the fund, even in equity. To make an equitable assignment, there should be such an actual or constructive appropriation of the subject-matter as to confer a complete and present right in the party meant to be provided for, even where the circumstances do not admit of its immediate exercise. If the holder of the fund retain control over it, it is fatal to the claim of the assignee. 'The transfer must be of such a character, that the fund holder can safely pay, and is compellable to do so, though forbidden by the assignor.' *Christmas v. Russell*, 14 Wall. 69, 20 L. Ed. 762."

TRADE-MARKS — INJUNCTIONS — NO EQUITIES BETWEEN ROGUES. — Justice Houghton declares that "equity does not adjust the differences between rogues," in *Fay v. Lambourne* (N. Y.), 108 N. Y. Supp. 874.

The facts were about as follows: Plaintiffs, husband and wife, were engaged in giving entertainments throughout the country under the name "The Fays." The entertainments con-

sisted in giving demonstrations of alleged mind reading and the telling of past and future events. The ability to do these things was represented to come from supernatural powers possessed by the wife. Sleight-of-hand tricks were interspersed in the course of the entertainment. Defendants were former employees who, having learned how the performances were given, commenced giving performances explaining and exposing plaintiffs' tricks. Defendants, in their bills, posters and other advertisements gave great prominence to the name "The Fays." In fact, the name was given such prominence as to deceive and mislead the public so that persons intending to go to plaintiffs' performance oftentimes went to defendants' performance. The suit was brought to enjoin the use of the name "The Fays" by defendants. In the trial court an injunction was granted, and an appeal having been taken, the judgment was reversed. In the course of the opinion, the court says:

"If the injunction was to stand, it is altogether too broad, and evidently much broader than the trial judge intended it should be from his memorandum decision. By that memorandum it was stated that the defendants should be enjoined only from using the words in such way as to mislead the public; but by the injunction granted the defendants are restrained from using plaintiffs' name in any way. The situation disclosed, however, is such that equity should not interfere at all. The plaintiffs are engaged in deceiving the public, and the most entertaining part of their performance is, in effect, fortune telling. In such a business they can get no property rights in a name or appellation which a court of equity will protect. The property right which the plaintiffs assert they have in the term 'The Fays,' and which they would have if their business was without deception, is similar to the right to the use of a trade-mark. Equity will not interfere to protect a party in the use of a trade-mark, where the name or phrase claimed as such is intended and calculated to deceive the public. *Fetridge v. Wells*, 4 Abb. Prac. 144; *Gluckman v. Strauch*, 99 App. Div. 361, 91 N. Y. Supp. 223. A party invoking the aid of equity to restrain the infringement of a trade-mark must himself be free from fraud in his representations to the public. *P. M. Co. v. P. M. P. Co.*, 135 N. Y. 24, 31 N. E. Rep. 990, 17 L. R. A. 129.

Persons who pretend to tell fortunes are defined to be disorderly persons. Cr. Code, Sec. 899. The pretense of occult powers and the ability to answer confidential questions from spiritual aid is as bad as fortune telling, and a species of it, and is a fraud upon the public. It is no answer, so far as the plaintiffs are concerned, that no one ought to believe the pre-

tenses. It is the half doubt and the half belief of a certain class of people that make and hold the audiences. If every one wholly disbelieved, curiosity would be soon satisfied, and the entertainment lose its attraction.

Nor is it any answer to say that the defendants are themselves guilty of wrong. Equity does not adjust the differences between rogues. The complainant is first judged, and not until he has been found free from taint does equity proceed to determine whether or not he has been wronged. The injunction should not have been granted."

A REVIEW OF THE GREAT CASE OF HADDOCK v. HADDOCK.*

While the decision in the case of Haddock v. Haddock, is now more than a year old, it is still interesting, and still commands the attention of the bar.

Harriet Haddock, a resident of the State of New York, sued her husband, John Haddock, in that state in 1899, and there obtained personal service upon him. The complaint averred that the parties were married in New York in 1868, where they both resided, and where the wife continued to reside; that the husband, immediately following the marriage abandoned the complainant and thereafter failed to support her, and that he was the owner of property. Complainant prayed for a decree of separation from bed and board and for alimony. John Haddock set up in his answer a decree of divorce of the court of Connecticut in 1881, obtained upon publication for the wife as a non-resident of Connecticut and by mailing notice to her at her last known place of residence. At the time of obtaining said divorce, John Haddock was a bona fide resident of Connecticut. The court below in this case refused to admit the judgment of the Connecticut court in evidence and rendered a decree for the complainant, Harriet Haddock. After affirmance in the Supreme Court of New York, and subsequently in the court of appeals of that state, this writ

of error was prosecuted in the Supreme Court of the United States. That court rendered the following decision: "Without questioning the power of the state of Connecticut to enforce within its own borders the decree of divorce which is here in issue, and without intimating a doubt as to the power of the state of New York to give to a decree of that character, rendered in Connecticut, within the borders of the state of New York, and as to its own citizens, such efficacy as it may be entitled to in view of the public policy of that state, we hold that the decree of the court of Connecticut rendered under the circumstances stated was not entitled to obligatory enforcement in the state of New York by virtue of the full faith and credit clause. It therefore follows that the court below did not violate the full faith and credit clause of the constitution in refusing to admit the Connecticut decree in evidence; and its judgment is, therefore, affirmed."

This article is not intended as a commentary upon the various situations which might result from the decision in this case, but to show its total inconsistency with other decisions of the Supreme Court therein cited and approved. The court, while distinguishing the case from each of those cited, reaches a conclusion wholly irreconcilable with all of them, upon any ground.

The court evidently holds that proceeding for divorce or separation is a proceeding in personam. For, while referring to *Pennoyer v. Neff*¹ as deciding irrevocably that a personal judgment rendered without service of process upon the defendant within the state is void, it says that this general rule "is limited by the inherent power which all governments must possess over the marriage relation." Citing *Maynard v. Hill*.² And referring to *Atherton v. Atherton*.³ it says:

"The courts of the state of matrimonial

(1) 95 U. S. 714.

(2) 125 U. S. 190.

(3) 181 U. S. 155.

*201 U. S. 562.

domicile, 'having jurisdiction over the husband, may, in virtue of the duty of the wife to be at the matrimonial domicile, disregard an unjustifiable absence therefrom, and treat the wife as having her domicile within the state of the matrimonial domicile for the purpose of the dissolution of the marriage.' "

That is, treat her as within the jurisdiction of the court, which would be unnecessary were the proceeding in rem. Yet *Maynard v. Hill* contains no intimation of any exception, in the case of divorce proceedings, to the rule that a personal judgment without service of process within the state is void. That was a case of legislative divorce, granted to a citizen against his non-resident wife, whom he had previously abandoned. The court upheld the validity of the Act upon the ground that divorces were a proper subject of legislation. It mentions the marriage relation as a status, not a mere contract, and holds that the legislature had jurisdiction of such a status. So *Maynard v. Hill* makes no exception to the requirement of service of process in case of personal judgments; and if the former suit of Haddock be treated as a proceeding in personam, this decision is irreconcilably in conflict with *Pennoyer v. Neff*.

If it be treated as a proceeding in rem, then the Connecticut court, upon the petition of John Haddock, had jurisdiction, and its judgment was binding, not only within that state, but in every other state of the union. For, a judgment rendered by a court having jurisdiction, is entitled to full faith and credit in every other state in the union.⁴

If this be a proceeding in rem, the decision of the court is irreconcilably in conflict with *Harding v. Harding*.

But says the court (p. 577): "If the marriage relation be treated as the res, it follows that it was divisible, and, therefore there was a res in the state of New York, and one in the state of Connecticut. Thus considered, it is clear that the power

of one state did not extend to affecting the thing situated in another state."

Which is to say that by the Connecticut decree John Haddock became a divorced man, but his marriage relation with Harriet Haddock, so far as she was concerned, remained with her in New York, unaffected by that decree. Granting that this be true, what would happen should she come into the state of Connecticut? It is true that a person may have by law a certain status in one state, and at the same time a different status in another state. For instance, one may be an infant in one state and at the same time an adult in another. Or, a woman may at the same time be under the disability of coverture in one state and entirely sui juris in another. But what, under the decision of the court, would be the status of Harriet Haddock should she afterward remove into the state of Connecticut? The decree of the court could not become operative by virtue of jurisdiction acquired after it was rendered. For it must be remembered that the Connecticut court had no jurisdiction of her person prior to this time, nor under the decision of the court herein, of her share of the divisible res. She would, then, continue to be the wife of John Haddock, although his relation to her had been dissolved. This is not only a contradictory statement of affairs impossible of actual existence, but it is in conflict with *Maynard v. Hill*,⁵ in which it was held that that divorce granted by a legislature having jurisdiction of the husband alone, was binding upon her and her heirs whenever they subsequently came into the territory. It might be argued that the divorce was binding only upon him, but the court made no intimation of such a division of the marriage relation as would make it possible to divorce him without divorcing her also. The Act in question was held to divorce the "husband and wife." It was held that "After the divorce *she had no such relation* to him as to confer upon her

(4) *Harding v. Harding*, 198 U. S. 317.

(5) *Supra*.

any interest in the title subsequently acquired by him."

From which it is clear that the idea of the divisibility of the res, so persistently recognized by the court in *Haddock v. Haddock* throughout its opinion, and which, indeed, is the only theory upon which it can be justified, is in conflict with *Maynard v. Hill*.

Thus it is apparent that if the former suit of *John v. Harriet Haddock* be taken as a proceeding in personam, this decision is in conflict with *Pennoyer v. Neff*, because it recognizes as valid in the state of Connecticut a decree rendered by one of its courts against a non-resident defendant without service of process within the state; if a proceeding in rem, then it is in conflict with *Pennoyer v. Neff*, or *Harding v. Harding*.⁶ For, either the court had jurisdiction or it did not have jurisdiction, of the res. If it had jurisdiction, the decision in this case is in conflict with *Harding v. Harding*, because the judgment of the Connecticut court is held not entitled to full faith and credit in the courts of New York; if it did not have jurisdiction of the res, then this decision is in conflict with *Pennoyer v. Neff*, because it holds valid in Connecticut a judgment rendered therein without jurisdiction either of the defendant or of the res involved. And if the former suit be held a proceeding only quasi in rem, or the res divisible, then this decision is in conflict with *Maynard v. Hill*, which treated the res or status of marriage as an indivisible relation, of which the legislature of the territory had jurisdiction by virtue of the husband's residence therein, notwithstanding his wife remained at their matrimonial domicile within another state.

The various decisions of the Supreme Court of the United States, cited and approved in *Haddock v. Haddock*, are reconcilable only on the theory advanced by the minority opinion rendered by Justice Holmes, viz.: That a divorce suit is a proceeding in rem; that jurisdiction of the

plaintiff draws to the court jurisdiction of the res, and that a judgment rendered by a court having such jurisdiction is entitled to full faith and credit in every other state of the union. If this were the law, in cases of separate domiciliation of husband and wife, the courts of the respective states would have concurrent jurisdiction to grant the divorce or separation. This proposition ought not to involve the absurdities or contradictions mentioned by the court in its opinion. The court says repeatedly that in such a condition of the law, the power of each state to decree a dissolution of the marriage tie of one of its citizens so as to make such a decree obligatory in all the other states by virtue of the full faith and credit clause of the constitution, would render nugatory the power of such other states to decree a dissolution of the marriage in favor of their own citizens. But the result would not be so sweeping. It would merely give to the court in which suit was first brought, if it had jurisdiction of the plaintiff, the prior jurisdiction—a principle familiar enough in other cases of concurrent jurisdiction. The court says further:

"Under the rule contended for it would follow that the states whose laws were most lax as to length of residence required for domicile, as to causes for divorce, and to speed of procedure concerning divorce, would in effect dominate all the other states. In other words, any person who was married in one state and who wished to violate the marital obligations would be able, by following the lines of least resistance, to go into the state whose laws were most lax, and there avail of them for the purpose of the severance of the marriage tie," etc.

Would not such a result be prevented in large measure by the fact that the courts of a state in which a domicile is fraudulently acquired for the sole purpose of obtaining a divorce, have no jurisdiction to grant it? This case also disposes of the objection that "the mere race

(6) 198 U. S. 317.

(7) *Andrews v. Andrews*, 188 U. S. 14.

of diligence between the parties in seeking different forums, or the celerity in which in such states judgments of divorce might be procured, would have to be considered in order to decide which forum was controlling." As to the race of diligence between husband and wife, at their respective places of bona fide domicile, it is no more than occurs in every case of concurrent jurisdiction; it has never been considered an objection to the jurisdiction of the court which first acquires it by the actual bringing of suit or service of process.

MARION GRIFFIN.

Memphis, Tenn.

**INSURANCE—FRATERNAL INSURANCE—
RELATION OF SUPREME LODGE TO
MEMBERS.**

**SUPREME LODGE KNIGHTS OF HONOR v.
HAHN.**

Appellate Court of Indiana, Division No. 2.
May 26, 1908.

The Supreme Lodge of a fraternal beneficial association consisting of a Supreme Lodge and local lodges and furnishing insurance to its members dependent on the maintenance of a benefit fund, stands as the representative of all the members, and it owes the duty to them to require that assessments be paid by each member as the law of the order requires.

A fraternal beneficial association issuing a benefit certificate can only compel payment of assessments by virtue of the constitution of the association providing for the suspension of any member failing to pay any assessment, and it cannot go into court and sue a member for an assessment.

The constitution of a fraternal beneficial association consisting of a Supreme Lodge and local lodges required every member to pay a monthly assessment, and provided that any member failing to pay an assessment should stand suspended and be entitled to no rights under his benefit certificate until reinstatement in the manner provided. A member made default in the payment of assessments, but the local lodge paid them to the Supreme Lodge. It was not shown whether the Supreme Lodge had knowledge of the facts. The member subsequently defaulted, and he then received notice of his suspension for non-payment of dues. He was familiar with the laws of the association. He made no effort to be reinstated. After his suspension a third person acting for him offered to pay the local lodge the assessments then due, which payment was declined on the ground that it would be necessary for the member to be reinstated. Held, that the member, by failing to make application for reinstatement, must be taken to have acquiesced in his suspension, thereby terminating the contract, and could not

rely on a former course of conduct by which the local lodge had frequently paid his dues and permitted him to reimburse the lodge.

RABB, C. J.: The appellant is a fraternal beneficial association. Jacob P. Hahn was a member of the association, and held a benefit certificate therein which named the appellee as the beneficiary. Said Hahn died on the 10th day of November, 1905, and this action was brought by the appellee in the court below upon the certificate. The appellant answered in four paragraphs. The appellee replied in two paragraphs. The cause was submitted to a jury for trial, verdict returned in favor of the appellee, appellant's motion for a new trial overruled, and judgment rendered in favor of the appellee on the verdict.

No question is raised in this court on the sufficiency of the pleading, and the sole question presented by the record for our consideration arises upon appellant's motion for a new trial, the overruling of which is assigned as error here. Among the causes assigned for a new trial are that the verdict is not sustained by the evidence, and that the verdict of the jury is contrary to law. The evidence is set out in the record, and shows without contradiction that the appellant is a fraternal beneficial order governed by a constitution and by-laws; that there are within the organization several distinct bodies having distinct offices to perform, the Supreme Lodge being the governing body; that one of the objects of the order is in the nature of life insurance, to provide for the payment of a sum of money to the person named by the member in a benefit certificate issued to him by the Supreme Lodge upon the death of the member holding such certificate who has complied with all the laws, rules, and regulations of the order; that this payment is to be made from a distinct fund provided by the laws of the order for that purpose known as the "Widows' and Orphans' Benefit Fund," and which is derived solely from monthly assessments made upon the members holding such certificates; that the control of this fund is under the exclusive management of the Supreme Lodge; that one of the bodies forming a part of this order is the local or subordinate lodge, which has a distinct organization of its own; that the monthly assessments for the maintenance of the widows' and orphans' benefit fund are not paid directly by the members to any officer of the Supreme Lodge, but are paid to the financial reporter of the local lodge, who turns them over to the treasurer of the local lodge. The laws of the order fix the monthly assessments, and require each member to pay such assessments, without notice, to the financial reporter or his lodge on or before the last day

of each month, and each local lodge is, under the laws of the order, responsible to the Supreme Lodge for the assessment of all members reported by the officers of the local lodge to be in good standing. On or before the 10th day of each month the treasurer of the local lodge was required to transmit to the treasurer of the Supreme Lodge all assessments paid over to him by the members on account of the widows' and orphans' benefit fund, and to accompany the funds with a report showing the number of members of the local lodge in good standing, with the names of those who since the last report have died or become suspended, but not the names of the members of the lodge in good standing, and the amount of the assessment so transmitted was required to correspond with the number of members reported in good standing in the lodge. The report was required to be signed by the treasurer, the reporter, and the financial reporter of the local lodge.

It is disclosed by the evidence that the only means the Supreme Lodge had of knowing the names of members who had failed to pay their assessments in accordance with the provisions of the laws of the order was this report made by the treasurer and the financial reporter. It is shown that in the year 1882 Jacob P. Hahn became a member of the order, and that the certificate sued upon was issued to him by the Supreme Lodge; that he continued to be a member of the lodge in good standing until the month of March, 1904, when he was suspended for failure to pay the January and February assessments for that year; that upon his application made in conformity with the rules and laws of the order he was on the 22nd day of March, 1904, unconditionally reinstated by his lodge; that he afterwards failed to pay the April and May assessments for that year, and was reported by the officers of the local lodge in their monthly report to the Supreme Lodge for the month of May following, made on the 12th day of May, as suspended for failure to pay the April assessment; that on the 8th day of June, 1904, his daughters, acting for said Hahn, offered to pay to the financial reporter of the local lodge the April and May assessments against Hahn, which payment the reporter declined to receive, stating at the time that their father had been suspended for non-payment of the April assessment, and that it would be necessary that he should be reinstated. The financial reporter also testified, and his testimony is undisputed, and there is no just ground for disbelieving it, that on the 10th day of June he had a conversation with Hahn, in which he urged Hahn to apply for reinstatement in the lodge; that Hahn said in answer to him that "he (Hahn) had just been to St. Louis, and

that the order was in bad shape, and that he would outlive the order and there was no use in paying another cent, and that he would not pay another cent"; and that upon further urging Hahn told him (the witness) that he would make up his mind between then and Tuesday, and if he did not see him on Tuesday he never expected to become a member of the lodge again. Hahn made no application for reinstatement, never made or offered to make further payment of any kind to the lodge, or did any act that in any way tended to show that he regarded himself as a member of the lodge, or under any obligation to bear any part of its burdens. Section 3 of article 8 of the constitution of the order required every member of the order, without notice, or or before the last day of each month, to pay to the financial reporter of the lodge of which he was a member, one assessment, according to the rules of the order fixing such assessment. Section 5 of article 8 of the laws of the order was as follows: "Any member failing to pay any regular or additional assessment required by the laws of the order shall thereby stand suspended, without action of his lodge or any officer thereof, and shall not thereafter be entitled to the benefit of the widows' and orphans' benefit fund, or of any rights under any benefit certificate issued to him, until he shall have been duly reinstated in accordance with the provisions of this article." Section 12 of said article provides as follows: "Any member of this order suspended for non-payment of dues, fines, or assessments desiring to be reinstated must, within one year after his suspension, make application in writing, either by himself or agent, to his lodge, at a stated or special meeting thereof, which application shall be acted on at such meeting of the lodge, when the applicant may be reinstated upon the following conditions only: If less than 45 days have elapsed since the date of his suspension, his application for reinstatement shall be accompanied with the amount in arrears for dues, fines, and all assessments made during his suspension, including the assessment or assessments on which he was suspended. In all such cases the subordinate lodge shall have a right to require a medical examination.* * * A ballot shall be ordered in all cases, and if a majority of the ballots cast are favorable the applicant shall be reinstated, but if either the medical examination or the ballot be unfavorable, the applicant shall stand suspended."

The evidence further discloses that of 171 monthly assessments paid by Hahn from 1890 to April, 1904, 98 of them were made to and received by the local financial reporter after the time fixed by the laws of the order for

their payment, some of them as much as two or three months after they were due. It is not made clearly to appear whether the Supreme Lodge knew of such custom on the part of the local financial reporter or not. It does not appear that any of the reports made by the local officers to the Supreme Lodge prior to March, 1904, reported Hahn as delinquent in the payment of his assessments and not in good standing. It does not appear that the local lodge frequently paid to the Supreme Lodge assessments for its members, including Hahn. There is no proof of any express agreement on the part of the association that Hahn might be permitted to pay his assessments otherwise than as required by the laws of the association and the contract, but it is contended by the appellee that by the indulgence extended to Hahn in the matter of the payment of the monthly assessments appellant deprived itself of the right to insist upon the payment of such assessments as the laws of the order and the contract between the parties contemplated; the theory being that by such long continued course of dealing the appellant misled Hahn into believing that it would permit him to pay the assessments at any time within 60 days after they were in fact due, and that, having been so misled into neglecting the payment of his assessment as required by the plain and well-known terms of his contract and with the laws of the association, and upon the refusal of the local financial reporter to receive his assessments thereafter tendered, he might safely refrain from taking any further action whatever for reinstatement, or notifying the lodge in any manner of his recognition of his obligation to bear his part of the burdens of the order and the maintenance of the insurance fund and still retain his insurance. We cannot agree with this contention. The very life of this order in so far as it undertakes to furnish life insurance to its members depends upon the maintenance of the widows' and orphans' benefit fund. This could only be done by the payment on the part of the members of the order of their monthly assessments for that purpose, and each and every member of the order had the right to insist that every other member should pay his assessments as the law of the order required. The Supreme Lodge in this matter stands as the representative of all the members, and it owes the duty to them to require that assessments be paid by each member as the law of the order requires. The only means by which the order can enforce or rather persuade the payment of the assessments is by virtue of that law of the order that denies to the members the benefit of the insurance unless the assessments are paid, as required by its terms. The contract is unilateral. The association could not go into court and sue Hahn for his

April and May assessments. He was under no legal obligation to pay them, and no legal remedy is open to the order for their enforcement. *Union Mutual, etc., v. Adler*, 38 Ind. App. 530, 73 N. E. Rep. 835, 75 N. E. Rep. 1088, and cases there cited.

While we recognize the fact that it has been held that, where an insurance company receives premiums or assessments after the forfeiture of the contract could have been claimed by the company on account of the insured failing to pay the premiums or assessments within the proper time, or where by its course of dealing with the insured the insurance company treats the contract as a valid and subsisting contract after it might have been declared forfeited for failure on the part of the insured to comply with some requirement in the contract of insurance, and thereby misleads the insured to his injury into believing that the contract still subsists, as illustrated in the cases of *Sweetser v. Odd Fellows, etc.*, 117 Ind. 97, 19 N. E. Rep. 722, and *Painter v. Industrial Life Ass'n*, 131 Ind. 68, 30 N. E. Rep. 876, and cases there cited, we think the facts in this case bring it far without the rule applied in those cases. Here, while it appears that the deceased, Hahn, was often indulged by the financial reporter of the local lodge in the payment of his monthly assessments prior to March, 1904, yet it is by no means clear that the Supreme Lodge had knowledge of such indulgence. Hahn was not only bound to know the laws of the order requiring him to make monthly payment of the assessments, but the evidence shows that he was familiar with them, and after his suspension for non-payment of dues in the month of March, he had no right to assume that he could with impunity disregard the provisions of the contract in reference to the payment of dues. He would not be permitted, nor would his beneficiary thereafter be permitted to say that he was misled into believing that he would not be suspended if he failed to comply with the rules of the order in reference to such payment, and it here appears from the evidence that no advantage was taken of Hahn by the order. He was notified of his suspension in ample time to have made application to his lodge for reinstatement within the 45 days when such reinstatement could have been made without imposing any conditions whatever upon him. Good faith to his lodge and common fairness required that he should at least have given his lodge the opportunity to reinstate him, as they had previously done a few months before, if he desired to continue his relations with the lodge. There is no good reason to suppose that the lodge would have refused to reinstate him or require him to submit to a medical examination; but if they arbitrarily refused to rein-

state him, or imposed conditions that made his reinstatement impossible, then he might, with some degree of justice, claim that his suspension was wrongful, and left him without a remedy. But until this plain and simple remedy had been exhausted, neither he nor his beneficiary can be heard to say that he was still a member of the lodge in good standing. To hold otherwise would be to allow Hahn, while in no manner bound to pay assessments or bear any other burden of the association, to still retain all the benefits that accrued to members who paid their dues and assessments and bore the burdens of the order. The association was bound to pay the policy or certificate while no reciprocal obligation rested on Hahn to pay assessments, for no one could pretend that upon the facts exhibited by the evidence the appellant could at any time have enforced the payment of the assessments against Hahn, or against his estate after his death. By failing to make application for reinstatement, Hahn must be taken to have acquiesced in his suspension, and thereby terminated the contract. Judgment reversed, with instructions to the court below to sustain the motion for a new trial.

Note—Fraternal Benefit Insurance—Suspension for Non-Payment of Dues.—In a fraternal benefit society, the contract of a member is a contract with every other member, and, as stated in the principal case, whether called the Supreme Council, or otherwise, the governing body represents all the members, and such governing body is bound to enforce all the laws of the order. Every member has a right to demand that every other member comply with the laws of the order. The provision as to suspension for non-payment of assessments, however, are strictly construed in favor of the insured. Bacon says: "In benefit societies the losses are paid from the proceeds of assessments, levied, as required, upon the members by a central or superior authority. The manner of calling these assessments is supposed to be set out in the constitution and by-laws, which also generally provide that if the member does not pay his assessments at the time prescribed, he forfeits all his rights as such member, or is suspended from those rights until such time as he shall be reinstated in accordance with the laws of the society. These provisions, being in the nature of penalties or forfeitures, are strictly construed as against the company." 2 Bacon on Benefit Societies (3rd Ed.), 939.

As the existence of a fraternal benefit society depends upon the payment of assessments lawfully levied, it becomes the duty of the governing body to protect the rights of every member by insisting upon compliance with the laws of the order by every other member. The laws relating to the payment of assessments are vital. Laxity in their enforcement would disrupt the society. It would result in unjust and illegal burdens being cast upon some. Whatever might be good policy however, in the principal case, the member stood suspended by the laws of the order.

Quoting from Bacon again: "If. . . by the laws of the society, non-payment of an assessment operates as a forfeiture, time is of

the essence of the contract and the member must elect, every time he is called upon to pay an assessment, either to pay within the stipulated time, or suffer the penalty of loss of membership and its benefits by neglecting or refusing to pay within that time." Bacon on Benefit Societies (3rd Ed.), 962.

See also *Borgraefe v. Knights of Honor*, 22 Mo. App. 137.

In *Lehman v. Clark*, 174 Ill. 279, it is held, in line with the principal case, that the contract of insurance in any mutual benefit society is unilateral contract, and that by the provisions made, a failure to pay the assessments by a member results in a loss of all benefits he may have had under and by virtue of such certificate, and that all payments theretofore made are forfeited. It is held that the making of the assessment does not make the member a debtor to the association, so as to authorize it to bring suit for its recovery in case of his neglect or refusal to pay; that the only liability the member is under is that of suspension. It is said in that case: "The payment of the premium is optional with the insured, and, if he makes default the insurer has no other remedy than a forfeiture of the policy." See also 33 Cent. L. J. 13.

JETSAM AND FLOTSAM.

DISCOURAGE HASTY FILING OF INVOLUNTARY BANKRUPTCY PETITIONS.

By Jas. L. McWhorter, President Nashville Credit Men's Association.

Nashville credit men have taken a decided stand against the filing of involuntary petitions in bankruptcy. No more bankruptcy suits are to be instituted by them until there has first been called a meeting of creditors and the proposed action is approved by a majority, both in number and amount. This is primarily to discourage the hasty filing of involuntary bankruptcy proceedings simply for the fees and without a due regard to the interest of creditors—an inclination which has grown almost into a fixed habit in many jurisdictions. But their action is also a protest against the steadily increasing cost of administration and the steadily decreasing rate of dividends received. Many of those charged with the administration of the bankruptcy law appear to be more concerned in devising new fees and increasing old ones than in obtaining the largest amount possible for creditors. But, while condemning the present methods of administration, Nashville credit men are generally favorable to the bankruptcy law, and are opposed to its repeal. The moral effect of the law is acknowledged to be very beneficial.

The action of the Nashville Association is not, however, intended to be simply a protest against useless litigation and extravagant administration; it means a long step toward earnest co-operation among creditors for the prompt and economical handling of the insolvent's assets, without the aid or intervention of any court. This is wisdom and common sense working tandem. There is, as a matter of fact, no more reason why the law should be invoked to distribute a few thousand dollars among creditors than that twenty fire insurance companies

should file a bill in equity to determine their proportionate losses in a conflagration.

Nashville invites all other creditors who do business in her territory to join in this movement. She pledges them a square deal.

Distant creditors are strongly urged not to lend themselves to bankruptcy proceedings in any section of the country, until they have first consulted the local creditors. This much, at least, common business prudence—not to speak of business courtesy—demands. There is nothing now to be gained and something likely to be lost, by rushing claims out immediately after a failure.—American Legal News.

BOOK REVIEWS.

COMPILED LAWS OF THE STATE OF UTAH, 1907.

This compilation includes all the laws of Utah of a general and permanent nature now in force, also the constitution of the United States, the constitution of Utah, the enabling act and the naturalization laws. The subjects are arranged alphabetically, and following the sections is a brief annotation, giving decisions of the courts in construing the section as well as showing from what source the various sections were derived. The work has been very thoroughly done, and the volume presents a very excellent appearance. It has been compiled, annotated and published by authority by an act of the legislature by James T. Hammond and Grant H. Smith, Compilation Commissioners.

Press and Bindery of Skelton Pub. Co., Salt Lake City.

OKLAHOMA FORM BOOK.

The authors, recognizing the need of a reference work of forms applicable to Oklahoma have prepared this book to supply that requirement. The book comprises four parts, the first embracing forms in conveyancing, etc.; the second, forms in pleading and practice in civil actions, and probate procedure; the third, forms in bankruptcy; the fourth, forms in the United States Land Office. The appendix contains also the rules of the supreme court, also the constitution of the State of Oklahoma. The book is one which is intended to be of practical value, and we believe it will be appreciated by the members of the Oklahoma bar. Authorities are cited in support of most of the forms given. The book is by R. A. Kleinschmidt and Mont F. Highley of the Oklahoma City Bar. Published by Democrat Printing & Lithographing Co., Little Rock, Ark.

FROST ON INCORPORATION AND ORGANIZATION OF CORPORATIONS, THIRD EDITION.

This work has been revised to January, 1908, and greatly enlarged. There is no departure from the plan of the former editions, but it has been enlarged by the addition of some two hundred pages of forms and general information. Some two hundred additional cases are cited, also the work is one of the most complete and convenient handbooks that has ever been issued. A brief digest of the statutory provisions of the several states is given, as well as forms covering various requirements of the several states. At the very foundation of this subject is the question of drafting the charter

which is carefully and ably discussed by the author, then follows a chapter on "Procuring the Charter," after this the organization proper is taken up and the various problems which then have to be met are discussed, such as issuance in payment of capital stock, legislative control over foreign corporations, which is followed by a very thorough digest of incorporation acts. The book will be of immense value to lawyers who have a corporation practice. The book is a comparative analysis of the corporation laws of the various states, and at times the corporation lawyer finds it of the utmost importance to have ready access to information of this character. This enlarged edition will doubtless be welcomed by the profession. It is by Thomas Gold Frost, and published by Little, Brown & Co., Boston, Mass.

HUMOR OF THE LAW.

Some people lose their heads at the first sign of defeat, and by so doing insure it. Not so one old lawyer, however. His presence of mind has obtained a favorable verdict on many occasions when the odds were decidedly against him.

Recently, it is said, he instructed a very young client of his to weep every time he thumped the desk in front.

Unfortunately, however, the young lady mistook one of the barrister's impressive taps for a decided thump, and burst into a fit of sobbing at the wrong moment.

"What is the matter with you?" demanded the presiding judge.

The lady looked up and answered through her tears:

"He"—indicating the barrister—"told me to cry every time he thumped the table!"

Here was a nice predicament, surely enough to unnerve the coolest. But the astute lawyer was equal to the occasion, and actually turned the circumstance to his advantage.

"Gentlemen," he said, impressively, turning to the jury, "how can you reconcile the idea of crime in conjunction with such childish candor and simplicity? I await your verdict with the utmost confidence."

And he was duly rewarded.—Answers.

A lawyer, when a certain case of his was called, rose and pleaded in a husky voice for an adjournment.

"On what ground?" asked the judge.

"Your honor," was the reply, "I have been making an address in another court all the morning, and find myself completely exhausted."

"Very well," said the judge. And he called the next case.

Another counsel arose, and in his turn asked for an adjournment.

"Are you exhausted, too?" said the judge. "What have you been doing?"

"Your honor," was the answer, "I have been listening to my learned brother."—Virginia Law Register.

"Don't you think," said a brother lawyer to Judge Greenwood of Georgia, "that Jim Pierson is the greatest liar of a lawyer that you ever saw?"

"I should be sorry to say that of brother Pier-

son," replied the judge, "but he is certainly the most economical of truth of any lawyer on the circuit."—*Virginia Law Register*.

When the Honorable Charles Stewart, now of Oklahoma, was a United States judge in the Indian Territory, a man named Childers, who was an attorney for one of the Indian tribes, came to him and said:

"Judge, you know the tribal law about stealing in our tribe."

"I do," said the judge.

"You know when we catch a man stealing we whip him the first time and shoot him the second time."

"I do."

"Well, Judge, there's a powerful bad man named Jackson over our way. He went a few nights ago and stole two of the finest pigs you ever laid eyes on. Now, Judge—"

"Yes," interposed Stewart.

"What I want to know is this: Can't I have that man Jackson whipped for stealing one pig and shot for stealing the other one?"—*Saturday Evening Post*.

WEEKLY DIGEST.

Weekly Digest of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of all the Federal Courts.

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1. **Accord and Satisfaction—Tender of Part in full Satisfaction.**—In order to compel a creditor to elect to accept an amount tendered in full satisfaction, or to reject it, the conditional nature of the tender must appear so clearly that a court could declare that its acceptance was an accord and satisfaction.—*Bahrenburg v. Conrad Schopp Fruit Co., Mo., 107 S. W. Rep. 440.*

2. **Account Stated—Presumptions.**—A general settlement is presumed to include all claims arising prior thereto; and the burden of proof is on the party seeking to avoid the evidence of such settlement.—*Kirkpatrick v. Tipton, Iowa, 114 N. W. Rep. 887.*

3. **Action—Equitable Relief and Defenses.**—The purpose of the statute authorizing pleadings on equitable grounds in certain cases at law is to facilitate the administration of justice in courts that deal with such equitable pleadings.—*Hobbs v. Chamberlain, Fla., 45 So. Rep. 988.*

4. **Mistake as to Form of Proceeding.**—Where a person brings an action at law which should have been brought in equity, the action should not be dismissed, but should be transferred to the chancery court, under Kirby's Dig. Sec. 5991.—*Newman v. Mountain Park Land Co., Ark., 107 S. W. Rep. 391.*

5. **Admiralty—Costs.**—A surety in a stipulation for costs given on appeal by a libellant in a suit in admiralty brought in forma pauperis held liable for the respondent's costs in both courts on affirmance.—*The Joseph B. Thomas, U. S. D. C., E. D. Pa., 158 Fed. Rep. 559.*

6. **Alteration of Instruments—Authority of Agent.**—An alteration of a written contract by an agent of one of the parties thereto does not avoid the contract, unless the agent had authority to make it.—*C. Shenberg Co. v. Porter, Iowa, 114 N. W. Rep. 890.*

7. **Appeal and Error—Filing Plea.**—There is no error in refusing at the trial the filing of a plea on equitable grounds where there has been long delay, and defendant has all the benefits of the defense under the plea of not guilty.—*Stone v. White, Fla., 45 So. Rep. 1032.*

8. **Parties Entitled to Allege Error.**—A cross-bill by defendants for partition, which was dismissed on trial and partition refused, will not be considered on plaintiff's appeal.—*Swartz v. Andrews, Iowa, 114 N. W. Rep. 888.*

9. **Questions of Fact.**—Where the evidence on each side of the controversy was substantial and the case was fairly tried and submitted, the judgment would not be reversed, though the appellate court would have arrived at a different conclusion on the facts.—*Garner v. Metropolitan St. Ry. Co., Mo., 107 S. W. Rep. 427.*

10. **Questions of Fact.**—Whether an act of a partner is within the scope of his authority is a question of fact for the trial court, and the appellate court will not disturb the finding if there is evidence to support it.—*Merrill v. O'Bryan, Wash., 93 Pac. Rep. 917.*

11. **Review.**—An ex parte affidavit, not contained in a bill of exceptions, but copied at large in the transcript on writ of error in a suit at law, cannot be considered for any purpose.—*Weeks v. Hays, Fla., 45 So. Rep. 987.*

12. **Assault and Battery—Instructions.**—In a prosecution for shooting at another with intent to do bodily harm, an instruction to find defendant guilty, whether the gun was shot off by defendant or not, provided he aimed the same at the prosecuting witness, held reversible error.—*State v. Hunsaker, N. D., 114 N. W. Rep. 996.*

13. **Provocation.**—In an action for injuries, the publication of an alleged defamatory article by plaintiff cannot be considered in reduction of the actual damages but only in reduction of, or set-off against, exemplary damages.—*Marriott v. Williams, Cal., 93 Pac. Rep. 875.*

14. **Attachment**—Motion to Vacate.—Where a motion is made to vacate an attachment, the sufficiency of the complaint will not be as strictly reviewed as when challenged by demurrer.—*Atkins v. Fitzpatrick*, 109 N. Y. Supp. 919.

15.—**When Allowed**.—The contract of an indorser of a note is a contract for the direct payment of money, so that an attachment may issue against the property of such indorser in an action to enforce payment of the debt, under Rev. St. 1887, Sec. 4302.—*Armstrong v. Slick*, Idaho, 93 Pac. Rep. 775.

16. **Bankruptcy**—Preferences.—Where the estate of a bankrupt is insufficient to pay in full the claims entitled to preference, the court may, where equity requires it, scale a claim which would ordinarily be entitled to priority over others.—In re Grignard Lithographing Co., U. S. D. C., E. D. N. Y., 158 Fed. Rep. 557.

17.—**Sale or Return**.—A delivery of goods to a bankrupt on memorandum for 30 days held not to vest title in the bankrupt until the expiration of such term, so that, on the filing of a bankruptcy petition, the seller was entitled to a return of all goods delivered within that period.—In re Schindler, U. S. D. C., S. D. N. Y., 158 Fed. Rep. 458.

18. **Benefit Societies**—By-Laws.—Members of a mutual insurance society are bound to take notice of by-laws, whether adopted prior or subsequent to the contract, if the contract makes such by-laws a part thereof.—*Norton v. Catholic Order of Foresters*, Iowa, 114 N. W. Rep. 893.

19. **Bills and Notes**—Bona Fide Purchasers.—An indorsee of accepted bills of exchange in security of a debt then created held a holder for value, and to continue such under subsequent renewals of the debt.—*Stewart v. Givens*, Mo., 107 S. W. Rep. 422.

20.—**Questions for Jury**.—A purchaser for valuable consideration before maturity of negotiable paper is not as a matter of law affected by notice of facts calculated to arouse suspicion as to the transaction in which the paper originated.—*Matlock v. Scheurman*, Or., 93 Pac. Rep. 823.

21. **Brokers**—Commissions.—A real estate broker under contract to procure a purchaser is not entitled to commissions unless he is successful.—*Ball v. Dolan*, S. D., 114 N. W. Rep. 998.

22.—**Compensation**.—A broker to whom is given the exclusive right to sell cannot recover commissions where the owner effects the sale.—*Wiegans v. Wilson*, Fla., 45 So. Rep. 1011.

23.—**Contracts**.—A real estate brokerage contract to bring about a sale at a fixed minimum price is not wholly performed by the introduction of one who subsequently becomes a purchaser at a reduced price.—*Varn v. Pelot*, Fla., 45 So. Rep. 1015.

24. **Carriers**—Failure to Furnish Cars.—A defense to an action for breach of an agreement to furnish cars and to recover damages sustained by delay in transit that the carrier was unable to furnish such cars on the date agreed on by reason of heavy traffic held unavailing, and properly stricken from the answer.—*Meriwether v. Quincy, O. & K. C. R. Co.*, Mo., 107 S. W. Rep. 434.

25.—**Liability for Negligence**.—Where a carrier undertakes to discharge the duty of loading live stock without notice to the shipper or his agent, it will be liable if negligent in performance of the act, notwithstanding a stipulation in the contract requiring the loading to be done by

the shipper.—*Chicago, B. & Q. R. Co. v. Pollock*, Wyo., 93 Pac. Rep. 847.

26.—**Negligence**.—In an action for injuries to plaintiff while a passenger on an S. avenue car when on a bridge, it will not be presumed, in the absence of proof, that the defendant had exclusive possession of the tracks over the bridge.—*Meshneck v. Brooklyn, Q. C. & S. R. Co.*, 109 N. Y. Supp. 594.

27. **Cemeteries**—Care of Private Lots.—Village charter authorizing village to purchase and hold property for a cemetery held to authorize it to take legacies only for the care of the lots and property of the village, and not for private lots.—In re Waldron, 109 N. Y. Supp. 681.

28. **Charities**—What Constitutes.—A bequest in trust to invest and reinvest the principal and expend the income in keeping testator's cemetery lot and monument thereon in good repair, is not a gift to a religious, educational, charitable, or benevolent use within Laws 1893, p. 1748, c. 701, and is invalid.—In re Waldron, 109 N. Y. Supp. 681.

29. **Compromise and Settlement**—Duty to Disclose Information.—Where there is no relation of trust between parties to a settlement, and no artifice is employed to prevent an investigation, complaint that information was not volunteered held unfounded.—*Multnomah County v. Dekum*, Or., 93 Pac. Rep. 821.

30. **Conspiracy**—Trade Union Strikes.—A circular inciting a strike held without probative force to show a conspiracy to incite and intimidate members of the union to strike.—*Delaware, L. & W. R. Co. v. Switchmen's Union of North America*, U. S. C. C., W. D. N. Y., 158 Fed. Rep. 541.

31. **Constitutional Law**—Failure of Legislature to Carry out Provisions.—The failure of the legislature to enact legislation carrying out the prohibition of Const. art. 19, Sec. 23, held not equivalent to affirmative legislation permitting the prohibited act.—*Griffin v. Rhoton*, Ark., 107 S. W. Rep. 380.

32.—**Interstate Commerce**.—The Elkins act (Act. Feb. 19, 1903, c. 708, 32 Stat. 847, U. S. Comp. St. Supp. 1907, p. 880) is not unconstitutional as in violation of the fifth amendment, because it subjects a shipper to criminal prosecution for accepting a concession from a rate published and filed, without permitting him as a defense to show that the established rate was extortionate and unreasonable, and that the rate paid was reasonable.—*United States v. Vacuum Oil Co.*, U. S. D. C., W. D. N. Y., 158 Fed. Rep. 536.

33. **Contracts**—Pleading.—Where a pleading alleges an absolute promise and the proof shows one that was contingent or conditional, the variance is fatal.—*Wiggins v. Wilson*, Fla., 45 So. Rep. 1011.

34. **Corporations**—Agent's Unauthorized Contract.—A contract of sale not binding upon a company, because made in its behalf by an agent without authority to do so is not binding upon the other party.—*American Brewing Assn. v. Gossett*, Tex., 107 S. W. Rep. 357.

35.—**Capital Stock**.—In an action against a corporation for the value of stock which it was claimed defendant refused to issue, an allegation that notwithstanding no demand had been made by plaintiff the stock had been issued and tendered held a good defense.—*Teeple v. Hawkeye Gold Dredging Co.*, Iowa, 114 N. W. Rep. 906.

36.—**Capital Stock and Dividends.**—As between the seller and buyer of stock, the buyer is entitled to all dividends on the stock which are declared after the sale, even though the transfer is not recorded.—*Tepper v. Ideal Gas & Electrical Fixtures Co.*, 109 N. Y. Supp. 664.

37.—**Issuance of Stock Certificates.**—In an action against a corporation for the value of stock which plaintiff claimed defendant had refused to issue to him, whether a delay in issuing the stock was unreasonable, and hence amounted to a refusal to issue it, held for the jury.—*Teepie v. Hawkeye Gold Dredging Co.*, Iowa, 114 N. W. Rep. 906.

38. **Courts—Comity.**—As between the states, the same rights are reserved by the constitution to the citizens of one that are accorded to the citizens of another, but beyond this the ability of a creditor to pursue his debtor in a foreign jurisdiction rests wholly upon comity, and upon the laws of such jurisdiction.—*McKee v. Dodd*, Cal., 93 Pac. Rep. 854.

39. **Criminal Evidence—Dying Declarations.**—It is error to refuse to strike out portions of the dying declaration giving the opinion of the deceased as to the intention of defendant.—*Gardner v. State*, Fla., 45 So. Rep. 1028.

40.—**Offer of Proof.**—Exclusion of questions to a witness, the relevancy of which is not made to appear, held not error, where the party propounding them is given an opportunity of repropounding such questions, and fails to do so.—*Pugh v. State*, Fla., 45 So. Rep. 1023.

41. **Criminal Law—Verdict.**—A verdict of guilty will not be disturbed as against the evidence where there is some evidence tending to connect defendant with the crime.—*Spencer v. Commonwealth*, Ky., 107 S. W. Rep. 342.

42. **Criminal Trial—Embezzlement.**—A charge on a trial for embezzlement held not to constitute reversible error, though it doubtless would have been preferable to have omitted from it any reference to the argument of the state's attorney.—*Lewis v. State*, Fla., 45 So. Rep. 998.

43.—**Illegal Sale of Liquor.**—On a trial for unlawfully retailing intoxicating liquor, held error to admit evidence that defendant had the reputation of being a "blind tiger" keeper.—*Smothers v. City of Jackson*, Miss., 45 So. Rep. 982.

44.—**Killing Animals.**—On a prosecution for maliciously killing hogs, in determining their value, evidence of value at a certain price per hundred, leaving the jury to decide as to the weight of the hogs, held not error.—*Carson v. State*, Neb., 114 N. W. Rep. 938.

45.—**Reversible Error.**—In a prosecution for violating the local option law, that the name of the alleged purchaser was spelled "Jiles" in a charge and "Giles" in the indictment held not to require a reversal.—*Holland v. State*, Tex., 107 S. W. Rep. 354.

46. **Customs Duties—Invoice Value.**—An importer, through mistaking a currency sign, stated the invoice value of his merchandise in dollars rather than rupees. Held, that it was a clerical error.—*United States v. Muller, Maclean & Co.*, U. S. C. C. of App., Second Circuit, 158 Fed. Rep. 405.

47.—**Specific Exemption from General Provisions.**—Where a species belonging to a general group is provided for separately in tariff legislation, the intention of congress to withdraw that species from the group is so clear as not

to be controlled by the omission of the qualification "not specially provided for" from the group provision though included in the other provision.—*United States v. Albert Lorsch & Co.*, U. S. C. C. of App., Second Circuit, 158 Fed. Rep. 398.

48. **Damages—Excessive Verdict.**—Where plaintiff's injuries consisted of a fracture of the right arm, necessitating amputation and a scalp wound, and a wound on the shoulder, a verdict of \$10,000 was not excessive.—*Larson v. Haglin*, Minn., 114 N. W. Rep. 958.

49. **Death—Damages.**—The right of the parent to look to the child for support held not an element of damages in an action for the child's death, where it does not appear that the parent is in need or likely to be so.—*Bourg v. Brownell-Drews Lumber Co.*, Ia., 45 So. Rep. 972.

50.—**Excessive Verdict.**—Where an employee 24 years old is killed by the negligence of his employer, and was a man of good character and health, and the beneficiaries are his widow and infant child, a verdict of \$5,000 is not excessive.—*Balder v. Zenith Furnace Co.*, Minn., 114 N. W. Rep. 948.

51. **Dedication—Persons Authorized to Make.**—An administrator merely authorized to sell decedent's land to pay debts may not dedicate any part of it as a street.—*Davis v. Town of Bonaparte*, Iowa, 114 N. W. Rep. 896.

52. **Deeds—What Constitutes.**—A contract providing that a certain person could take possession of a ranch and enjoy the products of the same until deeds were executed on the approval of another person named is not a deed, but an executory contract.—*De Bergere v. Chaves*, N. M., 93 Pac. Rep. 762.

53. **Descent and Distribution—What Law Governs.**—Subject to the limitation that the relation of a person to another is to be determined by the law of the former's domicile, the personal property of an intestate is to be distributed according to the law of his domicile, and his real estate according to the law of the place.—*Shick v. Howe*, Iowa, 114 N. W. Rep. 916.

54. **Divorce—Alimony.**—The trial of an action for separation held to be delayed by defendant and not by plaintiff, so as to prevent defendant from obtaining a modification of an order for temporary alimony, allowed on condition that the case be speedily tried.—*Brown v. Brown*, 109 N. Y. Supp. 637.

55.—**Grounds.**—Mere indiscreet conduct and relations with young men on the part of a married woman, all embraced under the general term "firting," is not cause for divorce.—*Hancock v. Hancock*, Fla., 45 So. Rep. 1020.

56. **Dower—Conveyance before Marriage.**—A secret conveyance in contemplation of marriage is fraudulent as to the spouse; the intent to deprive her of her marital rights which she would otherwise have acquired being presumed from the circumstances.—*Wallace v. Wallace*, Iowa, 114 N. W. Rep. 913.

57. **Easements—Stairways.**—Where there is an easement in the use of a stairway for access to an adjoining building, held custom could not sustain the maintenance of a door interfering with the convenient use of the stairway.—*Gardner v. San Gabriel Valley Bank*, Cal., 93 Pac. Rep. 900.

58. **Eminent Domain—Compensation.**—A judgment in condemnation proceedings fixing the compensation and ordering it paid held not

equivalent to actual payment, so as to deprive the owner of his right of possession.—*Beckham v. Slayden*, Ky., 107 S. W. Rep. 324.

59.—**Pleading**.—If complainant fails to state facts necessary to recovery, or states facts showing that he is not entitled to relief, he must suffer the consequences.—*Horne v. J. C. Turner Cypress Lumber Co.*, Fla., 45 So. Rep. 1016.

60.—**What Constitutes Appropriation**.—A crossing of plaintiff's track by the rails and cars of defendant steam railroad was not an appropriation of the property to the use of the latter, but a mode of exercising the public right of transit over the street.—*Louisville & N. R. Co. v. New Orleans Terminal Co.*, La., 45 So. Rep. 962.

61. **Equity**—**Pleading**.—Affirmative averments of an answer, a general replication having been filed, held of no avail, unless proved by independent testimony.—*Griffith v. Henderson*, Fla., 45 So. Rep. 1003.

62.—**Pleading**.—A replication puts in issue all matters alleged in the bill not admitted by the answer, as well as those matters in the answer not responsive to the bill.—*Griffith v. Henderson*, Fla., 45 So. Rep. 1003.

63. **Estoppel**—**Failure to Assert Title**.—In an action by a wife to set aside a conveyance made by her husband in contemplation of their marriage, and without her knowledge, plaintiff's conduct regarding a subsequent conveyance by the grantees held not to estop her from asserting her dower, right.—*Wallace v. Wallace*, Iowa, 114 N. W. Rep. 913.

64.—**Representations**.—Where one holds out an infant as being of full age, he is estopped to set up the infancy against a person who has acted on the representations, with nothing to put him on notice of the truth.—*Harris v. Ronk*, Ky., 107 S. W. Rep. 341.

65. **Evidence**—**Documents**.—Where a witness testifies by reading from documents to things of which he has no personal knowledge, nor any knowledge that the documents stated the facts correctly, the evidence is inadmissible as hearsay.—*Meriwether v. Quincy, O. & K. C. R. Co.*, Mo., 107 S. W. Rep. 434.

66.—**Expert Testimony**.—Whether it is proper and customary in certain circumstances to apply steam to a locomotive to start it in making a coupling is a proper subject for expert testimony.—*Galveston, H. & S. A. Ry. Co. v. Mitchell*, Tex., 114 N. W. Rep. 374.

67.—**Failure to Object to Introduction**.—Where evidence inadmissible has been admitted without objection, and the witness examined and cross-examined, it is not error to decline to strike out such evidence.—*Lewis v. State*, Fla., 45 So. Rep. 998.

68.—**Motion for Security of Costs**.—Where the sheriff joined in a motion for security for costs in an action of replevin after accepting a delivery bond, it is not an admission by the sheriff that the delivery bond was insufficient.—*McAleenan v. Dickmann*, Mo., 107 S. W. Rep. 444.

69.—**Negligence**.—Where negligence in an action for death of a pedestrian by being struck by a street car was predicated entirely on the absence of a fender from the car, the court held entitled to take judicial notice of the purpose of fenders as applied to such cars.—*Spilking v. Consolidated Ry. & Power Co.*, Utah, 93 Pac. Rep. 838.

70. **Execution**—**Innocent Purchasers**.—An attorney for a judgment creditor who buys at his client's sale under execution is not an innocent purchaser.—*Woods v. Hayes*, Ark., 107 S. W. Rep. 387.

71. **Executors and Administrators**—**Accounting**.—A defense interposed by an executor to an order for payment to a legatee held unreasonable, so that he was not entitled to credit for the interest he was required to pay because of his appeals.—*In re Peters*, Mo., 107 S. W. Rep. 406.

72.—**Claims of Non-resident Creditors**.—Since the statute does not forbid a creditor resident in a sister state, the right to present his claim against an estate being administered in this state, whether the administration be primary or ancillary, comity will dictate that such a claim should be entertained.—*McKee v. Dodd*, Cal., 93 Pac. Rep. 854.

73. **False Imprisonment**—**Justification**.—When a private person seeks to justify his imprisonment of another, it must appear that he has complied with the law warranting such imprisonment.—*Kroeger v. Passmore*, Mont., 93 Pac. Rep. 805.

74. **Fire Insurance**—**Insurable Interest**.—The equity maxim that "the law will consider that done which ought to have been done" does not apply to deprive insured on all insurable interest in an action to collect insurance upon a structure judicially held a nuisance and order it removed.—*Irwin v. Westchester Fire Ins. Co.*, 109 N. Y. Supp. 612.

75. **Fraud**.—**Action to Rescind Sale of Stock**.—To rescind a contract or recover damages for fraud, knowledge must be alleged and proved, and either the representation of a fact as true which is known to be false, or the representation of knowledge when no knowledge exists and the facts represented are not true is sufficient to constitute fraud.—*Lambert v. Elmen-dorf*, 109 N. Y. Supp. 574.

76. **Frauds, Statute of**.—**Agreements not to be Performed Within a Year**.—The year within which a contract not in writing must be performed to escape the bar of the statute of frauds commences from the date of contract, and not from the date of entry upon its performance.—*Womach v. Jenkins*, Mo., 107 S. W. Rep. 423.

77.—**Delivery and Acceptance**.—Where goods were in possession of the buyer at the time of a parol sale thereof, no further delivery and acceptance were necessary to satisfy the statute of frauds.—*Godkin v. Weber*, Mich., 114 N. W. Rep. 924.

78. **Fraudulent Conveyances**—**Consideration**.—On the issue of fraudulent conveyance, based on insufficiency of the consideration, an outstanding void tax title is admissible as tending to affect the market value of the land.—*Stone v. White*, Fla., 45 So. Rep. 1032.

79. **Garnishment**—**Non-resident Defendants**.—The courts have jurisdiction of garnishment proceedings against nonresident parties in all cases where the defendant and garnishee are personally served while in the state.—*McShane v. Knox*, Minn., 114 N. W. Rep. 955.

80. **Grand Jury**—**Presence of Attorney in Grand Jury Room**.—A deputy enforcement commissioner appointed under Laws 1907, p. 303, c. 187, has no right to visit grand jury sessions either under his appointment as assistant state attorney nor his employment by the board of county commissioners to enforce the prohibitory

law.—*Ex parte Corliss*, N. D., 114 N. W. Rep. 962.

81. **Highways**—Obstruction.—No equities in favor of a person obstructing highway can be founded on the acquiescence of the highway or other officials, or on their laches.—*Eble v. State*, Kan., 93 Pac. Rep. 803.

82. **Homicide**—Dying Declaration.—Where the state seeks to introduce a dying declaration, it should be shown that, when it was made, the deceased believed he was without hope of recovery.—*Gardner v. State*, Fla., 45 So. Rep. 1028.

83. **Husband and Wife**—Action Between.—In an action of replevin by a husband against his mother-in-law to recover a diamond ring, where his wife from whom he was separated, but not divorced, intervened, and claimed the ring as her property, and judgment was had for the wife, plaintiff held not entitled to a reversal because of no judgment against the mother-in-law.—*Lee v. Patterson*, Miss., 45 So. Rep. 980.

84. **Constructive Trusts**.—Where a husband obtained money belonging to his wife without her written consent, she was entitled to treat him either as a debtor or an implied or constructive trustee.—*Smith v. Settle*, Mo., 107 S. W. Rep. 430.

85. **Physician's Services**.—A wife's liability for physicians' services rendered in her husband's last sickness under Code, Sec. 3165, held an independent statutory liability enforceable against her, though the physicians' claim against the husband's estate was barred.—*Vest v. Kramer*, Iowa, 114 N. W. Rep. 886.

86. **Separate Estate**.—Where a married woman purchases furniture and fixtures for a hotel business, executes her note therefor and a mortgage on her separate real estate to secure its payment, the debt incurred is enforceable against her, and her separate estate so mortgaged.—*Booth Mercantile Co. v. Murphy*, Idaho, 93 Pac. Rep. 777.

87. **Injunction**—Dissolution.—A temporary injunction restraining eviction proceedings in the county court should not be dissolved on the ground that relief may be obtained by a plea on equitable grounds in such proceedings.—*Hobbs v. Chamberlain*, Fla., 45 So. Rep. 988.

88. **Enforcement of Public Rights**.—Under Code, Secs. 2448, 2450, 2453, held individual citizens of a city may enjoin the retaining of names on a census roll fraudulently placed there to show a population entitling saloons to operate on a consent of a bare majority of the voters.—*Semones v. Needles*, Iowa, 114 N. W. Rep. 904.

89. **Insane Persons**—Presumption.—The presumption is that all persons are mentally sound until the contrary is shown.—*Succession of Jones*, La., 45 So. Rep. 965.

90. **Intoxicating Liquors**—Violation of Local Option Law.—In a prosecution for violation of the local option law, evidence that persons present when the sale was made were convicted of drunkenness held incompetent to show that the drinks sold prosecuting witness were intoxicating.—*Isom v. State*, Tex., 107 S. W. Rep. 350.

91. **Justices of the Peace**—Service of Process.—Where a justice's judgment was based on a summons served outside the county, a person claiming thereunder was bound to show that there was attached a certificate of the county clerk that the person issuing it was an acting justice of the peace, under Code Civ. Proc. Sec. 849.—*Ferguson v. Basin Consol. Mines*, Cal., 93 Pac. Rep. 867.

92. **Limitations of Actions**—Conveyances in Fraud of Dower.—Where one, in contemplation of his marriage with plaintiff, without her knowledge, deeded certain land to his children by a former wife, the statute of limitations did not begin to run against her right to attack the deed until the death of her husband.—*Wallace v. Wallace*, Iowa, 114 N. W. Rep. 913.

93. **Place of Accrual of Action**.—In a legal sense, a cause of action cannot have two places of origin, but can arise in but one place, and, in the case of a note made payable in the state where the payee lives it arises in that state.—*McKee v. Dodd*, Cal., 93 Pac. Rep. 854.

94. **Mandamus**—Title to Office.—Where a judge refuses to recognize the person holding prima facie title to the office of clerk of the district court, mandamus is a proper remedy to compel such recognition.—*Matney v. King*, Okl., 93 Pac. Rep. 737.

95. **Marriage**—Annulment.—Although an action to annul a marriage be undefended, sufficient proof of the facts alleged to warrant annulment must be offered in order to obtain a decree.—*Vazakas v. Vazakas*, 109 N. Y. Supp. 568.

96. **Master and Servant**—Assumed Risk.—A street railway motorman held not to have assumed the risk of injury from the inability of the motorman of the colliding car to stop the same, because of defective brakes with which it was equipped.—*Garner v. Metropolitan St. Ry. Co.*, Mo., 107 S. W. Rep. 427.

97. **Contributory Negligence**.—That a brakeman did not instantly realize that he could not adjust a defective coupler without remaining between the cars longer than was prudent held not as a matter of law contributory negligence.—*McGuire v. Quincy, O. & K. C. P. Co.*, Mo., 107 S. W. Rep. 411.

98. **Injuries to Third Persons**.—An act done by a servant while engaged in his master's work, causing injury to a third person, but not done as a means for performing that work, cannot be deemed the act of the master.—*Daugherty v. Chicago, M. & St. P. Ry. Co.*, Iowa, 114 N. W. Rep. 902.

99. **Mechanics Lien**—Separate Contracts.—A materialman who furnishes material for a building under separate contracts, with knowledge of such contracts, cannot tack one contract to the other by filing his claim of lien within the required time from the date of furnishing material under one of the contracts.—*Valley Lumber & Mfg. Co. v. Driessel*, Idaho, 93 Pac. Rep. 765.

100. **Mines and Minerals**—Statutory Regulation.—The legislature cannot exonerate a mine owner who uses prescribed precautions to prevent injury from discharge of debris into rivers from liability for injuries to others occurring notwithstanding the precautions.—*Sutter County v. Nichols*, Cal., 93 Pac. Rep. 872.

101. **Mortgages**—Foreclosure.—The purchaser under foreclosure of a mortgage on land held to take as an appurtenant easement water rights acquired for the land by the mortgagor subsequent to the mortgage.—*Stanislaus Water Co. v. Bachman*, Cal., 93 Pac. Rep. 858.

102. **Municipal Corporations**—Appointment of.—Where the time of a person's appointment as city clerk of a city had expired, and he held over as authorized by its charter, a vacancy in the office existed and the power to appoint a successor might be exercised.—*Smith v. Bogaske*, 109 N. Y. Supp. 598.

103.—**Contract with Former Trustee.**—A contract for the construction of sidewalks held not invalid because the contractor was a town trustee until resigning just before bidding, though he was reappointed several months afterwards.—*Harrison v. Town of Prestonburg, Ky.*, 107 S. W. Rep. 337.

104.—**Dedication of Highway Subject to Easements.**—A street or highway established by dedication or prescription is subject to easements, obstructions, and private uses made of it at the time the dedication is made, or when the use becomes such as to imply a grant or dedication.—*Davis v. Town of Bonaparte, Iowa*, 114 N. W. Rep. 896.

105.—**Granting Street Railway Franchises.**—The granting of a license by a city to a street railway company to operate its railway on certain streets constituted an exercise of governmental power, under which the city acts as the representative of the state, and not in a private capacity.—*Potter v. Calumet Electric St. Ry. Co.*, U. S. C. C., N. D. Ill., 158 Fed. Rep. 521.

106.—**Misdemeanors.**—An ordinance providing that all offenses made misdemeanors under the state laws shall constitute offenses against the municipality incorporates into the ordinances all state laws relative to misdemeanors.—*Smothers v. City of Jackson, Miss.*, 45 So. Rep. 982.

107.—**Validity of Ordinance.**—A taxpayer having no direct or personal interest in a subject of an ordinance held not authorized to sue to restrain its enforcement.—*Brummitt v. Ogden Waterworks Co.*, Utah, 93 Pac. Rep. 828.

108.—**Navigable Waters—Tide Lands.**—Land lying between the lines of the ordinary high and low tides and covered and uncovered successively by the ebb and flow thereof constitute tide lands.—*People v. Kerber, Cal.*, 93 Pac. Rep. 878.

109.—**Negligence—Cellarways.**—The owner of a building held not liable for injuries to a pedestrian who walked along the side thereof on a dark night, and fell into an open cellarway.—*Davis v. Town of Bonaparte, Iowa*, 114 N. W. Rep. 896.

110.—**Duty Toward Licensee.**—The mere permission of the owner or occupier of lands or buildings of allowing people to enter on and use a part of his premises held not to amount to an invitation but only to show a license.—*Herzog v. Hemphill, Cal.*, 93 Pac. Rep. 899.

111.—**New Trial—Motions.**—A motion to set aside a nonsuit and grant a new trial, not filed within four days, excluding Sunday, after the nonsuit, cannot be considered.—*Jones v. Marblehead Lime Co., Mo.*, 107 S. W. Rep. 420.

112.—**Officers—Creation of New Offices.**—Const. Sec. 217, giving the legislature express authority to enact any law looking to the enforcement of the prohibitory law, did not give it power to create new offices.—*Ex parte Corliss*, N. D., 114 N. W. Rep. 962.

113.—**Partnership—Nature of Relation.**—A partnership indicates that the partners are to engage in some definite business in which they are to share the profits, and the basis of the relation is a contract between them.—*Chappell v. Chappell*, 109 N. Y. Supp. 648.

114.—**Real Estate Acquired by Partner.**—Equity will apply its broad principles to secure to all partners their rights in real estate which equitably belongs to the firm by regarding the legal title if in one partner as held in

trust for partnership purposes, and this doctrine extends to implied as well as express trusts.—*Whitney v. Dewey*, U. S. C. C. of App., 158 Fed. Rep. 385.

115.—**Scope of Business.**—One dealing with a partner without notice may hold the copartners, where the transaction is such as the public may reasonably conclude is embraced within the partnership business.—*Merrill v. O'Bryan, Wash.*, 93 Pac. Rep. 917.

116.—**Payment—Checks.**—When a debtor gives his check for the amount of his indebtedness, the prima facie presumption arises that as the check was taken merely as conditional, not as absolute payment, though, to make the rule applicable, there must be a debt either precedent or contemporaneous.—*Matlock v. Scheuerman*, Or., 93 Pac. Rep. 823.

117.—**Pleadings—Amendments.**—An amendment to pleadings setting up a defense which would have been a bar to the actions when brought, but when asked for was merely a technical defense not barring new actions, should not be granted.—*Calvert v. Thurston*, 109 N. Y. Supp. 567.

118.—**Amendment.**—That plaintiffs in an amended petition sue in their individual capacity does not change the cause of action asserted in the original petition setting forth a cause of action in their favor as a firm.—*Mayer v. Magill, Tex.*, 107 S. W. Rep. 363.

119.—**Principal and Agent—Acting for Parties Adversely Interested.**—One employed to secure for his employer options on mining claims cannot receive compensation from the parties executing the options without losing his right to compensation from the employer ignorant of the facts.—*Lemon v. Little*, S. D., 114 N. W. Rep. 1001.

120.—**Quietting Title—Parties Plaintiff.**—Two sons, claiming that each owns a divided half of certain land under the will of their mother, and seeking to remove from their title the cloud of a fraudulent deed affecting the moieties of both, were properly joined as plaintiffs, under Code Civ. Proc. Sec. 381.—*Gillespie v. Gouley*, Cal., 93 Pac. Rep. 856.

121.—**Railroads—Negligence.**—Where a child was negligently permitted to ride on a hand car by defendant's sectionmen, and was injured, the original wrong in permitting him to ride was the proximate cause of the injury.—*Daugherty v. Chicago, M. & St. P. Ry. Co., Iowa*, 114 N. W. Rep. 902.

122.—**Reference—Common Law Reference.**—In case of a common-law reference, if it appears that the referee has exercised his honest and incorrupt judgment in finding the facts, after a full and fair hearing of the parties, the court cannot decline to accept the report upon the ground that the referee has erred in his judgment.—*United States v. Ramsey*, U. S. C. C., D. Idaho, 158 Fed. Rep. 488.

123.—**Reformation of Instruments—Mistake.**—A vendor, having subsequently executed a deed to a purchaser from his vendee, held entitled to have the same reformed to conform to the contract with the original vendee.—*McAdow v. Wight*, Mo., 107 S. W. Rep. 421.

124.—**Pleading.**—The allegation of mistake authorizing the reformation of a contract must be as full and satisfactory in order to warrant a decree of reformation, as is required of the proof.—*Horne v. J. C. Turner Cypress Lumber Co., Fla.*, 45 So. Rep. 1016.

125. **Sales—Rescission.**—Failure of a buyer of flour to countermand an order for other flour as agreed held not to establish a fraudulent purpose on the buyer's part, entitling the seller to rescind.—*John Blaul & Sons v. Wandel*, Iowa, 114 N. W. Rep. 899.

126. **Schools and School Districts.**—Right to Office.—One held not to lose the office of school district trustee through the failure of the superintendent to perform his duty respecting the recording of the election and qualification.—*McGlone v. Zornes*, Ky., 107 S. W. Rep. 329.

127. **Specific Performance.**—Grounds of Remedy.—Whether a contract will be specifically enforced is a matter of judicial discretion, but it must be a sound legal discretion, and, where the testimony furnishes no reasonable grounds for different conclusions, there is no ground for the exercise of discretion.—*Stevens v. Trafton*, Mont., 93 Pac. Rep. 810.

128.—**Pleading.**—Where the petition alleges that plaintiff has elected to accept a conditional option, and there is no allegation that the condition has been complied with, an exception of no cause of action should be sustained, and the demand rejected.—*Southern Sawmill Co. v. Baldwin Lumber Co.*, La. 45 So. Rep. 961.

129.—**Unrecorded Deeds.**—Where both parties acted in good faith, one in possession of land under a lease and option to purchase which has been recorded is not entitled to specific performance of the option by a grantee claiming under a prior unrecorded deed from the same person.—*Lindley v. Blumberg*, Cal., 93 Pac. Rep. 894.

130. **Statutes—Legislative Construction.**—A legislature has no power to construe a law enacted by its predecessor, so as to affect acts done under such preceding statute prior to the enactment of the construing act.—*Great Northern Ry. Co. v. Snohomish County*, Wash., 93 Pac. Rep. 924.

131. **Statute of Frauds—Parol Lease.**—Where in forcible detainer defendant claims under a parol lease for more than one year, it is proper to direct a verdict for plaintiff.—*Kofoid v. Lincoln Implement & Transfer Co.*, Neb., 114 N. W. Rep. 937.

132. **Street Railroads—Rights in Street.**—The public held not deprived of the right to use a street by the construction of a street railway thereon; the rights of the public and the railway company being reciprocal, except as to the railway company's preferential right of passage.—*Spiking v. Consolidated Ry. & Power Co.*, Utah, 93 Pac. Rep. 838.

133. **Sunday—Violation of Law.**—Employees of a company under contract to supply water and light to a town and its inhabitants held not violating Sunday law in generating steam on that day.—*Turner v. State*, Ark., 107 S. W. Rep. 388.

134. **Taxation—Review by Courts.**—That an appellant is a nonresident held not to deprive the district court of jurisdiction of his appeal from the refusal of local authorities to set aside his assessment.—*Shirk v. Township Board of Review of Monmouth*, Iowa, 114 N. W. Rep. 884.

135. **Tenancy in Common—Actions by Co-Tenant.**—A tenant in common may sue separately in ejectment, and, if defendant shows no title, may recover possession of the entire estate in

subordination to the rights of his co-tenant.—*DeBergere v. Chaves*, N. M., 93 Pac. Rep. 762.

136. **Tender—Conditional Tender.**—A creditor, accepting money tendered conditionally, assents to the condition, and cannot accept the money and reject the conditions.—*Bahrenburg v. Conrad Schopp Fruit Co.*, Mo., 107 S. W. Rep. 440.

137. **Trial—Order of Proof.**—In an action by an employee for compensation, defendant held entitled to show a certain fact on cross-examination of plaintiff, and thereby defeat the action, though such fact was pleaded as a defense.—*Lemon v. Little*, S. D., 114 N. W. Rep. 1001.

138.—**Right to Open and Close.**—Proponent of a will is plaintiff and opponent defendant, and, though opponent raises the distinct issue of insanity, it does not give him the right to open and close.—*Succession of Jones*, La., 45 So. Rep. 965.

139. **Trusts—Compensation of Trustee.**—The estate of a life beneficiary in a testamentary trust held entitled to full commissions for receiving and paying out the corpus of the trust fund.—*In re Wilcox*, 109 N. Y. Supp. 564.

140. **Vendor and Purchaser—Irrigation.**—An agreement for sale of water for irrigation held not a personal covenant, but a contract for sale of real estate, binding on a purchaser of the water company's plant, taking with notice.—*Stanislaus Water Co. v. Bachman*, Cal., 93 Pac. Rep. 858.

141.—**Specific Performance.**—A defendant held not estopped to set up rights under unrecorded deed as a defense against plaintiff's action for specific performance of an option to purchase.—*Lindley v. Blumberg*, Cal., 93 Pac. Rep. 894.

142. **Waters and Water Courses—Action to Establish Right.**—Where defendant is entitled to water saved and developed by it above the natural flow of a stream, the court must determine with such exactness as is possible how much water is saved and developed.—*Pomona Land & Water Co. v. San Antonio Water Co.*, Cal., 93 Pac. Rep. 881.

143.—**Maintenance of Dam.**—A judgment which prohibits the maintenance of a dam at a height that would cause the pond to extend at the natural flow beyond a certain point is not void for indefiniteness.—*Meveigh v. International Paper Co.*, 109 N. Y. Supp. 574.

144. **Witnesses—Cross-Examination.**—Where accused pleaded an alibi claiming to have been sick when the offense was committed, held proper to ask him on cross-examination the nature of his sickness.—*Moore v. State*, Tex., 107 S. W. Rep. 355.

145.—**Privileged Communications.**—The delivery by the widow of a deceased owner of a map of a block platted by the deceased to the attorney for the estate of the deceased is not a privileged communication from client to attorney.—*Myers v. Kenyon*, Cal., 93 Pac. Rep. 888.

146. **Work and Labor—Breach of Contract.**—Though one's failure to perform contract for services is inexcusable, he may recover the reasonable value of services rendered less any damage to the employer by the breach.—*Stoile v. Stuart*, S. D., 114 N. W. Rep. 1007.

147.—**Part Performance.**—An architect, having failed to perform agreed services because of a conflict in taste, held not entitled to recover on a quantum meruit for part performed.—*Stroeh v. McClintock*, Mo., 107 S. W. Rep. 416.

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PROPERTY RETAINED BY ATTORNEYS ON GROUND OF ILLEGAL OR IMMORAL DESIGN ON PART OF PARTIES WHO TRUSTED THEM.

When property of a client through advice of his attorney is made over to such attorney to avoid creditors, or is retained by attorney because of moral turpitude of client in which the attorney participated in so turning over such property and cases of this sort, there arise some interesting questions.

That an officer of the court would be guilty of holding fast to property he had become possessed of, upon the alleged ground that he was guilty of fraud together with his client, is a strange and incongruous situation. That there is a total lack of moral sense in such a mind does not require second thought. That such a mind has no business to be engaged in the practice of the law needs no comment.

Perhaps the most brazen defense to an action by an attorney which has ever come to our notice, was that of J. A. Smith, an attorney practicing at Kansas City, Kansas, in the case of *Smith v. Blank*, 69 Kans. 853, 76 Pac. Rep. 858. The facts relied upon by him were that, during the pendency of an action in the district court of Lyon county, involving the forgery of a deed, claimed to have occurred in his office while he was practicing law in Emporia, J. W. Blank, one of the parties to that action, and the plaintiff in said suit, called upon him to induce him to either give false evidence upon the trial in favor of J. W. Blank, or absent himself so that his deposition could not be taken, or service of subpoena could not be made; that he agreed, in consideration of \$200 to either absent himself, or, if he testified, to testify falsely. In pursuance of this agreement, J. W. Blank paid him \$10 in cash and gave him the diamond in question to secure the remainder. Smith's

contention was that the plaintiff ought not to recover because he parted with the diamond for an illegal or immoral purpose. The comment on the part of the court was terse and pointed and as follows: "The iniquitous engagement into which Smith entered, according to his own statement, furnishes sufficient cause not only to disbar him from the practice of the law, but probably subject him to fine and imprisonment. We have not read the briefs nor examined the record. The statement of plaintiff in error convinces us that he is not entitled to anything at the hands of this court but the severest censure and a dismissal of his proceeding." Yet in the face of this, Smith set up a defense to the disbarment proceeding and appealed from the judgment of the court disbarring him to the court which rendered the above opinion, and again that court scathed him as he deserved in upholding his disbarment.

There is every reason why a defense of this character should be similarly treated in every court where it is set up. Nor can we see how any member of the bar would be willing to lend his aid to such a defense; in doing so, he is *particeps criminis*, and ought to be subjected to a similar judgment. But the strangest part of all this is, that there is "many a man" who would condemn, in the roundest terms, such conduct as that of which Smith was guilty, and at the same time go to church on Sunday, engage in the communion service and then deliberately set about bilking his fellow-man, with a clear conscience of his own on the next day.

In the case of *Place v. Hayward*, 117 N. Y. 487, plaintiff and defendant's wife were children of the testatrix and interested in the estate. Plaintiff's evidence was to the effect that among the assets which came to his hands as executor, was a bond and mortgage and two endowment policies of insurance issued to testatrix on the life of her husband; that the plaintiff on the advice of the defendant, who was his attorney, and upon whose counsel and advice he impliedly relied in the management of the estate, they both fearing that the securi-

ties might be seized by adverse claimants, creditors of the testator's husband, assigned them to the defendant for the purpose of protecting them against such claimants and without any consideration for such assignments, with the understanding that the proceeds should belong to such estate; the defendant collected the insurance policies and received a portion of the proceeds of the collection of the bond and mortgage. The defendant set up the illegal purpose for which the transfer was made and claimed it as a defense to his keeping the money thus obtained; that the courts would not aid in a recovery because of this fraud. The court very properly held that an attorney by whose advice such a situation was brought about was not *in pari delicto* with the party whom he was influencing and that for this reason the rule he sought to invoke, to protect him in his fraudulent conduct, did not apply. They were not *particeps criminis*. In the face of such situations and their liability to arise, it is of the greatest importance that the courts should punish such conduct in the severest manner.

Another case which may be used to show our view, is that of *Ford v. Harrington*, 16 N. Y. 285, where an attorney on application of his client to know whether his equitable interest in certain land could be reached by his creditor, procured from his client an assignment of such interest for an inadequate consideration, promising to reconvey when he had settled with the creditor. Afterwards the attorney claimed to hold absolutely against his client.

It was held that although the object of the assignment was to perpetrate a fraud upon the creditor, yet on account of the relations existing between attorney and client, the attorney must be compelled to restore what he had acquired on being repaid what he had disbursed. We believe the court could have properly gone further and said that, because of the fraudulent conduct of the attorney in that case, he should return the property without reimbursement of the amount paid by the attorney for the equity, for there was a

willful attempt to defraud, amounting to malice, which would justify the exercise of the punitive force of the law.

NOTES OF IMPORTANT DECISIONS

SALES—FAILURE TO PERFORM EXECUTORY AGREEMENT WHICH IS PART OF CONSIDERATION.—In the recent case of *Bland v. Wandel* (Iowa), 114 N. W. Rep. 899, it is held that mere failure to perform an executory agreement which is part of the consideration of or the inducement to a sale is not in itself proof of fraud existing at the time of the sale.

Defendant wrote plaintiff that he had ordered a carload of flour elsewhere, which was unsatisfactory, and would cancel the order if plaintiff would accept the order for a carload on terms mentioned in defendant's letter. The order was accepted. Afterwards, plaintiff learned that prior to the giving of this order, defendant had placed a mortgage on his property in favor of intervenor. Defendant did not cancel the previous order for a carload of flour as he had stated he would, and, having become involved, plaintiff brought replevin to recover the flour sold, setting up defendant's failure to rescind the prior order as a fraud. The court says:

"It is elementary that the mere failure to perform an executory agreement which is part of the consideration or inducement to the making of a contract of sale will not per se constitute such fraud as to authorize the subsequent rescission of the contract by the other party." Citing *Van Vechten v. Smith*, 59 Iowa, 173, 13 N. W. Rep. 94; *State Bank of Indiana v. Mentzer*, 125 Iowa, 101, 100 N. W. Rep. 69; *State Bank of Indiana v. Gates*, 114 Iowa, 323, 86 N. W. Rep. 311; *Chicago, T. & M. C. R. Co. v. Titterington*, 84 Tex. 218, 19 S. W. Rep. 472, 31 Am. St. Rep. 39. The court goes on to say that: "If it can be shown that when the inducing promise was made and a sale consummated in reliance thereon the buyer had a secret intention not to perform the obligation which he undertook to perform in the future, then this secret intention not to perform, in itself, constitutes such fraud as to warrant a rescission if the promise was relied on by the seller, and was a material inducement to the making of the sale. *Cox Shoe Co. v. Adams*, 105 Iowa, 402, 75 N. W. Rep. 316; *Swift v. Rounds*, 19 R. I. 527, 35 Atl. Rep. 45, 33 L. R. A. 561, 61 Am. St. Rep. 791; *Donaldson v. Farwell*, 93 U. S. 621, 23 L. Ed. 998. But the fraud relied upon must have existed at the time of the sale; it can-

not consist in a subsequent failure to perform an executory agreement. *Kearney Mill. & E. Co. v. Union Pac. R. Co.*, 97 Iowa, 719, 66 N. W. Rep. 1059, 59 Am. St. Rep. 434. The mere failure to perform an executory agreement which is a part of the consideration of or inducement to the sale is not in itself proof of fraud existing at the time of the sale. *Theussen v. Bryan*, 113 Iowa, 496, 503, 85 N. W. Rep. 802; *Starr v. Stevenson*, 91 Iowa, 684, 60 N. W. Rep. 217."

CORPORATIONS—PAYMENT FOR CAPITAL STOCK IN OVERVALUED PROPERTY.—The subject of payment of capital stock of a corporation in overvalued property, and the consequent liability of the stockholder to the creditors of the corporation is discussed at length in *Johnson v. Tennessee Oil, etc., Co.* (N. J.), 69 Atl. Rep. 788. The suit was a creditors' bill brought by complainant on behalf of himself and all other creditors. Prior to bringing the suit a judgment had been recovered in the state of New Jersey, and execution having been issued was returned unsatisfied. The theory under which the suit was brought was that the capital stock was paid up in property grossly overvalued, and that the stockholders were therefore liable to the creditors of the corporation for the difference between the value of the property turned over to the corporation and the par value of the stock, or such proportion thereof as might be necessary to satisfy the claims of the creditors. The "trust fund" theory, as it is called, is examined by the court at great length, and the authorities reviewed. The "trust fund" theory of capital stock has in recent years become a fixed principle in the law of corporations. Under this theory, the capital stock of a corporation is a trust fund for the benefit of the creditors first, and then the stockholders. As is said in the principal case: "For a fraudulent use of the statutory and charter provisions by the issue of stock for property at a fraudulent overvaluation the holders of stock so issued would, however, remain subject to liability to creditors, under the equitable principles generally referred to as the 'trust fund' theory of capital stock. The capitalization in this case was so grossly excessive as to be fraudulent, and the complainant would be entitled to relief on this ground of fraud but for the fact that he was a subsequent creditor, with full notice of the fraudulent overvaluation."

The rule is founded upon the supposed reliance of the creditor upon the assets of the company as represented by its capital stock, it being held that a creditor dealing with a concern having a paid up capital stock of say, one hundred thousand dollars, has a

right to assume that the corporation has received one hundred thousand dollars in payment of such capitalization, either in money, or in money's worth. If, then, it develops that the directors and stockholders have bartered away the capital stock for some comparatively worthless consideration, as some patent of unknown value, or oil leases, as in the principal case, or for tangible property which is not reasonably worth anything like the amount of capital stock issued in payment, the stockholders are liable at the suit of the defrauded creditor for the difference between what they have actually paid, and the par value of the stock received.

The question has frequently been raised as to the circumstances under which the stockholder may become liable, for example, whether he is liable if he has acted in good faith, and really believed that the property was of the value of the stock received. There is a strong tendency to hold the stockholder liable even where he has acted in good faith. In other words, the actual value of the property is the test, and good faith is no defense. *Simons v. Vulcan Oil Co.*, 61 Pa. St. 202. On this point the Supreme Court of Missouri, in the case of *Berry v. Rood*, 168 Mo. 331, said: "When men are carried away by a mining prospect, they have a right to take such chances in speculation as they see fit in order to develop the prospect, provided they involve only themselves. But when they endeavor to hide their individual liability in a corporation and launch upon the business community a company which they proclaim as solemnly as men can proclaim anything, has a full paid capital of \$300,000, and invite confidence accordingly, when they well knew that, so far as then developed, it has not 5 per cent of the amount available for use in the treasury, they violate both the letter and the spirit of our laws on this subject and render themselves liable to creditors who have been misled, to the extent of their unpaid capital stock." And, again, the same court, in *Meyer's Case*, 192 Mo. 189, said: "The property must be fully equal to the value placed upon it, and its value is determined by the fact and not by the opinions of the persons turning it over, even though they may have honestly believed it to be worth the amount certified."

In the principal case, the American trust doctrine is adhered to, but another principle defeated the complainant. He had knowledge of all the facts at the time he became a creditor. In fact, he was the attorney for the company, who engineered the deal, and the court holds, in line with the best authority, that as he had knowledge of the facts, he must stand in the position of any other creditor with notice. Equity does not grant this form of relief in these cases to those who know the

actual facts, or who are put on inquiry, and nevertheless extend credit. The case is one that will repay a careful reading.

CARRIERS—COMMENCEMENT OF RELATION OF PASSENGER AND CARRIER—DEGREE OF CARE.—It is held in *Pere Marquette R. Co. v. Strange* (Ind.) 84 N. E. Rep. 819, that the relation of passenger and carrier commences when a person with the good-faith intention of taking passage, with the consent of the carrier, express or implied, assumes the situation to avail himself of the facilities for transportation which the carrier offers. The plaintiff having entered the railroad company's premises for the purpose of taking a train in due course, and purchased a ticket entitling him to transportation between designated points, was, while approaching the train upon which he was to be carried, a passenger. This position is supported by numerous authorities cited by the court, among which are the following: 6 Cyc. 536; *Citizens Street R. Co., v. Jolly*, 161 Ind. 80; *Freemont, etc. R. Co. v. Hagblad*, 72 Neb. 773; *Exton v. Central R. Co.*, 63 N. J. 356.

The proposition is laid down in this case that the degree of care required of a common carrier when a passenger is, actually being transported is of the highest. It is held that the carrier is bound only for the exercise of ordinary care as to passengers who are not being actually transported but who are about the premises, station, platform, etc. The rule is stated as follows:

Appellant does not deny that the relation of passenger had been established before and existed at the time of the accident in which appellee was injured, but a sharp conflict is waged as to the measure of appellant's duty to him as such passenger while approaching one of its trains. The common law, for the purpose of determining questions of liability for injury, divided passengers into two classes—(1) those being transported, and (2) those not being transported. The highest practical care and diligence were exacted of the carrier for the safety of passengers of the first class, and in case of injury resulting from defective roadbed, equipment, or management a presumption of the carrier's negligence was indulged by law in favor of the injured person. The carrier was bound only for the exercise of ordinary care with respect to passengers of the second class, and in case of accidental injury no presumption as to negligence existed in favor of either party. The common-law rule has not been rescinded or modified by statute in this state. The propriety and justice of the requirement that a high degree of care be exercised for the security of passengers of the

first class, and the sound public policy upon which the presumption of negligence in case of accidental injury to one of that class from defective roadway or equipment is founded, are manifest. A passenger being transported at a high rate of speed by powerful engines is helplessly in charge of the carrier, required to obey its regulations, and to rely for his safety wholly upon the foresight, care, and prudence of its agents. All of its ways, instrumentalities, and methods of operation are exclusively within its control, and the slightest omission or neglect with respect to any of these things is likely to be followed by frightful consequences. This court, appreciating the grounds upon which the rule was founded, has consistently held that when an injury is sustained by a passenger in transportation upon a railroad on account of the defective condition of roadbed, equipment, or management, the happening of the accident constitutes *prima facie* evidence of negligence on the part of the operating company, and devolves upon it the duty of establishing such facts as will exempt it from the imputation of negligence. *Cleveland, etc., Ry. Co. v. Hadley* (Ind.) 82 N. E. Rep. 1025; *Pittsburg, etc., Ry. Co. v. Higga*, 165 Ind. 694, 76 N. E. Rep. 299, 4 L. R. A. (N. S.) 1081; *Terre Haute, etc., R. Co. v. Sheeks*, 155 Ind. 74, 56 N. E. Rep. 434; *Cleveland, etc., R. Co. v. Newell*, 104 Ind. 264, 3 N. E. Rep. 836, 54 Am. Rep. 312.

It is further argued that the special circumstances and risks attending the actual transportation of passengers do not exist with respect to passengers before entering or after leaving the coaches of such carriers. The perils which surround the passenger while around the platform, station, etc., are not different in kind from the peril encountered elsewhere. In other words, the passenger is able, to a considerable degree to look out for himself, but when on the train the passenger is peculiarly helpless, and absolutely dependent upon the carrier for his safety.

AGENCY—BURDEN OF PROOF—EVIDENCE.—In *Rumble v. Cummings* (Ore.), 95 Pac. Rep. 1112, it is held that where a party relies upon a contract, made with a person claiming to be an agent of another party, he must prove where the agency is disputed, that the person claimed to be an agent was expressly empowered by the person for whom he acted to make the agreement for him, and that the terms of the contract made were within the scope of the authority, conferred, or that the principal knowingly permitted the agent to assume that he had power to make such contracts, or held the agent out to the public as possessing such power, or that the

principal, with full knowledge of the agent's arrogation of power in making the contract, ratified the agreement, citing *Hahn v. Guardian Assurance Co.*, 23 Ore. 576, 32 Pac. Rep. 683, 37 Am. St. Rep. 709; *Jameson v. Caldwell*, 25 Ore. 199, 35 Pac. Rep. 245; *Connell v. McLaughlin*, 28 Ore. 230, 42 Pac. Rep. 218.

One dealing with an agent must satisfy himself of the agent's authority except as above, and where agency is alleged it must be established by the party relying upon the agency.

THE ADVISABILITY OF A LONGER LAW SCHOOL COURSE AND OF A HIGHER STANDARD OF ADMISSION.

The writer has noted with some interest the recent article in the January issue of the *Law Notes* anent the two year course in Southern law schools.

The position seems to be taken in this paper that a two year course in law is self sufficient where the standard of admission is high enough.

In North Dakota at the State University a two year law course for the day students is maintained, and, although it can be truthfully said that as conscientious and industrious a body of students as could be desired by a lecturer there attend, nevertheless, it is quite apparent that the two year course is too short not only for the student, who is not a college graduate, but as well for the student who has received his Baccalaureate degree, for we have both classes of students in our law course.

We take it to be conceded, at least among our brethren, that there is no profession or calling which requires a broader or deeper fundamental knowledge than the profession of the lawyer. The various and diverse phases of life with which it deals necessarily requires this for the successful practitioner, so that to-day there is a universal demand and a general trend among the law schools of our country requiring a broader fundamental knowledge and a higher mental training on the part of the student who desires to pursue a law course.

We realize that this whole matter must

be considered from a practical, rather than a theoretical viewpoint with due regard to the actual results desired to be attained.

Thus, numerous instances can be cited where the student with some of the practical training of life, and without a collegiate training has far outstripped his brother student who is a college graduate, not only in grasping and comprehending the law, but also in the presentation of a more logical and receptive mind, and the same comparison can be drawn by individual citations of the lawyer without collegiate or law school training easily surpassing his opponent at the bar who has been equipped with both.

However, to-day the thought is generally accepted that a collegiate training offers the better and the quicker, the more scientific and the more logical way of equipping the student with the fundamental knowledge and the mental comprehension requisite for the study of the higher professions.

To no one is this statement more forcibly realized than it is to the lecturer in a law school who has in his classes, students, some who are college graduates, others who are without any collegiate training.

For, in the long run, the maintenance of a low standard of admission on the part of any law school simply means that, for those students who thereby secure admission to the curriculum of the law school course, just so much more time and effort must be spent by them, and in part, must be diverted from their law studies in order that they may be permitted to acquire that mental training and perceptiveness which will enable them to partially, at least, apprehend the work undertaken by them. But this is not all, for the burden is likewise thrown upon the instructor to spend that much of his time and effort as will give to this class of students the necessary fundamental enlightenment which must in many cases precede the apprehension of the legal study then being pursued, all of which shortens the time for the proper pursuit of the law work and retards the advancement of the

class as a whole. For it cannot be gainsaid that as full and complete a mental training is required for the apprehension of the law as for the comprehension of medicine or any other special branch of science.

Therefore, it is of primary importance that the standard of admission be made so high that the requisite preliminary training is first secured by the student: Otherwise, a law school must be a training school as well, unless it shall graduate students unprepared and ill fitted for their profession.

For without a high standard of admission the mere length of the law school course is no efficient criterion, comparatively, of the legal learning acquired by the student, though it be conceded that the relative merits of the corps of instructors and the methods of instruction pursued by the same; since in one case where the students are without training it may well happen that a good portion of the time is taken in actual work of a training school, whereas in the other case, where the students have received a good preliminary training, more legal learning may have been imparted and received in the shorter course.

In fact, in the observation of the writer, it has occurred that a student with an excellent collegiate training has easily pursued and completed the three years' course of a certain Western law school in two years, and perhaps with less difficulty than many students complete the ordinary course in a law school whose term is two years.

It is apparent that the standard of admission for nearly all of the law schools of this country has been too low. This is admitted by the general efforts that are being made by all classes of law schools to raise the standard of admission, and by the further fact that something is being accomplished gradually in that direction.

However, the pertinent question in this respect is how the desired standard of admission can be attained.

The trouble very largely has been that a law school has been viewed by educators

and by the layman also, too much from the commercial standpoint; the question of numbers has been considered in preference to the question of quality. In some cases it has been considered a matter of pride that a named school is self supporting. The question whether the College of Arts is upon a paying basis is immaterial, but it is worthy of comment and of complaint, in fact, if a law school is not paying its way through its attendance.

In this light, of course, they are not treated as a necessary educational agency of the state, but rather, as an adjunct much the same as a commercial course or a conservatory of music, added to give prestige to the institution by the additions of numbers without any expense thereto attached.

With this view in mind, it is readily observable why the University of Chicago is able to insist upon and require a collegiate training as a pre-requisite for admission to its law school, irrespective of the small numbers that it may have in attendance at its school by reason thereof, and why other law schools in Chicago and elsewhere in the United States have not yet been able to attain this standard of admission.

What reason can be urged why the law school should not be viewed as an essential educational agency of the state?

Expensive and elaborate departments are maintained generally by state and other educational institutions whereby experts in the sciences, in literature and in the ancient and modern languages are trained at the expense of the state with little expense on the part of the post graduate who desires to take such courses. Here, however, a high standard of admission is required.

The naval cadet at Annapolis, the army cadet at West Point, each is arduously trained at the expense of the nation in order that he may be fully equipped for its defense and protection. Here, again, a high standard of admission is required.

The lawyer is an officer of the state. The laws which govern our human actions and relations are just as important to the state as the laws affecting inert bodies, as the

laws concerning letters or philology, or as the laws which affect combatants at war. Is it not just as essential that the men who very largely frame, prosecute, interpret and enforce our laws should be as carefully educated, and the same requirements insisted upon as likewise apply to the other vocations mentioned.

But so long as the requisites for admission to the bar in the different states have little regard for the previous general training of the applicant it is, and will continue to be a difficult matter for the law schools of the country to enforce a higher standard of admission without the financial backing which will enable them to disregard the numbers in attendance and the revenues to be derived thereby.

It behooves the courts and the bars of the different states to call for and insist upon a gradual and increasing higher standard of admission until that standard is adopted which will give some assurance that the applicant for admission to the bar has not only the legal learning necessary, but also the fundamental training as well.

This can be accomplished by either requiring a collegiate training or providing for an examination along fundamental lines in lieu of it.

Now, as to the length of the law school course, when we look over our magnificent fields of jurisprudence, should it be said that a course of two years is all sufficient when we observe a four years' course required for a medical education, a three years' course required for a dental graduate, and at least as many years necessary in other courses along scientific lines.

Is that the comparative measure of our jurisprudence with the other sciences in point of comprehension?

Are we not compelled to conclude that the average student in a law school whose term is two years can get, at the best, only a rather hazy idea of the magnificent systems of the common law and the civil law and of our modern jurisprudence? Yet is it not proper, and almost essential, that there be a fundamental training along

these lines if the school aims to add to the members of the bar a student fitted to become a finished lawyer?

As a matter of fact, the ordinary law course of two years encounters considerable difficulty in comprehending the modern legal precedents and the modern phases of the law with scant reflection on the fundamentals which have created them. For in this allotted time the modern divisions of the law as usually taught can scarcely be completed and the general principles underlying these subjects apprehended without regard to their sources and the causes that have brought them into existence.

It will not do to say that the student will find out what the law is, and how it must be applied when he acquires the experience of an active practice or that a lengthy course of training in schools makes a theoretical man, whereas a man who has learned by experience is practical and nearer the people.

Such arguments by their mere assertion deny the merits of scientific methods of teaching and training and, furthermore, it is too self evident from the lessons taught by our modern industrial and professional world that the scientifically taught mind and the well trained hand are the one that are rewarded with success.

It is well enough to say that the law graduate at his entrance into practice is but a mere apprentice who has yet to serve his time; that he can practice on the public, build up his store house of knowledge and glean from his older and learned contemporaries the legal lore that it is essential for him to acquire.

Yet, what incentive is afforded or what desire is fostered for such a student in his two year course to acquire fundamentals later, or to apprehend at a subsequent time the correlations of the various phases of the law? What opportunity has the struggling young lawyer busy with small cases and petty matters whereby his daily sustenance is gained, at his wits' end to understand the codified law of the state wherein he is practicing, the procedure and what

not, to take himself aside and view systematically the jurisprudence of his profession?

Has his two years' course taught him that this is necessary? Has it, in fact, even shown the way? Does not such a course, on account of its brevity, rather tend to discountenance such fundamental and research work and serve to produce the case lawyer, the man who is concerned with the precedent of yesterday for the needs of to-day with no formulative opinions for the morrow?

It possibly may be as suggested by Mr. Street in his recent article on this subject that plants are more rapid in their growth in tropical places and humankind is there more precocious both physically and mentally and that therefore in a Southern country it may well be expected that the period of school and college work shall end at a somewhat earlier age than in a country farther North.

However, we seriously doubt whether this justifies a two years' law course in the South as a measure of the precociousness of its student.

Upon the whole, the same length of time for mental training is required in one section of the country as in the other and in view of the great mass of statutory law, codified and not codified, and the vast numbers of judicial precedents, federal and state, that must necessarily be presented to the student for his assimilation and with which he is required to be familiar upon his admission to the bar, it is rather presumptuous to expect the law student in two years to apprehend the modern law as it exists to-day and to also acquire a fundamental education of our jurisprudence.

The latter is necessarily sacrificed for the former on account of the local and modern legal knowledge required for admission to the bar of the particular state.

Theological inference consequently follows that this fundamental education must be built up, if at all, by the student during the busy days of his actual practice and in a manner that is too apt to be haphazard and unscientific.

It is questionable whether the three years' law course is of sufficient length. The legal problems that are being presented to this nation to-day certainly require a special and well grounded training such as the best and most scientific methods can afford and, in this respect, the thought is worthy of notice that, if the bench, the bar, and the legal educators of the different states would co-operate in the establishing of both a higher standard of admission and a longer period of training both for the bar and the school, in this, the noblest of all professions and the one that requires the greatest mentality and learning, the bench and the bar would receive a higher tone and added dignity which would be reflected not only in better judicial precedents but in more intelligent legislation as well.

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PHYSICIANS AND SURGEONS—ACTION FOR MALPRACTICE—SUFFICIENCY OF EVIDENCE.

SAUERS v. SMITS.

Supreme Court of Washington, June 4, 1908.

In a malpractice suit against a physician, evidence held sufficient to take the case to the jury.

The fact that a patient discontinued the treatment of a physician before she should have done so, and thereby augmented an injury caused by the negligence or incompetency of the physician, did not preclude her recovery for the injury caused by the physician.

The fact that a patient did not follow a physician's instructions for treatment, and thereby suffered an injury, would not preclude her recovery for the physician's negligent or incompetent treatment.

RUDKIN, J.: This action was instituted to recover damages for malpractice. Without going into the details of the complaint, the substance of the plaintiffs' cause of action is that during the early part of the year 1906 the plaintiff Mrs. Sauers was suffering from an ailment of the foot, and applied to the defendant, who is a regularly licensed physician and surgeon, for treatment. The treatment prescribed and ad-

ministered consisted in the daily exposure of the affected member or part to the light and rays of an X-ray machine for a period of about a month, each exposure lasting from 15 to 30 minutes. After this course of treatment had continued for some two weeks, the foot began to swell, itch, and burn. The treatment continued for about two weeks longer, at the expiration of which time the entire left side of the foot from the toe to the heel was severely burned, so that the skin came off and a large angry sore, involving the whole side of the foot, was formed; and, by reason of the treatment prescribed, the foot is permanently injured, the patient has been rendered a cripple for life, and the injury will probably necessitate the amputation of the foot. The negligence charged is that the defendant failed to shield or protect the foot from the X-rays, that he should have discontinued the X-ray treatment as soon as the burning and scalding of the foot made its appearance, and that the tube or bulb of the X-ray machine was placed too close to the foot. Issue was joined on the complaint, and, from a judgment and verdict in favor of the defendant, the plaintiffs have appealed.

Two questions have been presented for the consideration of this court: First, the sufficiency of the evidence to warrant the submission of the case to the jury; and, second, the accuracy of one of the instructions given by the court. The testimony on the part of the appellants tended to show that there were 17 daily exposures of the foot to the X-ray machine, except on one date toward the last when the patient was unable to attend the hospital; that no shield was used to protect the foot from the X-rays; that the tube or bulb of the X-ray machine was placed not to exceed two or three inches from the foot; that the exposures after the first lasted from 25 to 30 minutes; that at the expiration of about two weeks from the first exposure the foot became very red and itched and burned, and that this condition grew gradually worse from day to day until the patient was no longer able to go to the hospital; that thereafter the respondent attended the patient once at the home of her brother-in-law, where she was stopping, but did not call on the following day, and another physician was called in; and that after the fifth exposure to the X-rays a medicated paste was spread over the affected part, which was about the size of a nickel. There was further testimony tending to show that at the close of the respondent's treatment there was an X-ray burn of the fourth degree on the foot which is generally considered incurable. It is unnecessary to refer to the testimony bearing upon the condition of the patient after this time

as it would only go to the measure of damages, and that question is not before us. The testimony on the part of the respondent, on the other hand, tended to show that the number of exposures was about 10; that the tube or bulb was placed from 4 to 6 inches from the foot; that the exposures occurred only every other day, and lasted from 8 to 18 minutes; that the red or burnt appearance of the foot was caused by the paste, and not by the X-rays; that the patient had used her foot contrary to instructions, and by reason thereof the paste spread from the affected part to other parts of the foot; that there was no X-ray burn of any kind; that the treatment was proper; and that at the time of the trial the foot was entirely cured, and in a healthy condition. There was further testimony on the part of the respondent tending to show that the X-ray is comparatively a new discovery, and was not well understood by physicians and surgeons practicing in such communities as Aberdeen at the time this treatment was given. The appellants denied that the patient had disobeyed instructions, or that the paste had spread from the affected part to other portions of the foot, or that the condition of the foot was caused by the paste. It will thus be seen that there was a direct conflict in the testimony on many essential points. The jury would have been authorized in finding that the injured foot was severely burned by the X-rays, that the treatment was improper, and that the injury was caused by one or more of the acts of negligence charged in the complaint. If it should appear that physicians and surgeons in such communities as Aberdeen were as ignorant of the effect of X-ray exposures as some of the testimony tends to show, the jury might well conclude that the use of such a dangerous agency by one who had little or no knowledge as to the probable consequences was negligence per se. We are satisfied, therefore, that the motion for a nonsuit and the motion for a directed judgment were properly denied.

The instruction complained of by the appellants is as follows: "If you find from the evidence that the patient quit the treatment of the defendant before she should have done so, and before he was willing she should quit him, and that any evil results have come from that action on her part, then she would not be entitled to recover. If you believe that the defendant gave her directions as to how she should act, and as to how she should treat her foot, how she should use it and take care of it during the time she was treating it, and she did not follow those directions with reasonable care and diligence upon her part, and any injury has resulted on account of that negligence or want of attention or care upon her part, then

she would not be entitled to recover." This instruction was erroneous. If we assume that the patient quit the treatment of the respondent before she should have done so, and before he was willing that she should quit him, or that she neglected to follow instructions as to how she should use and care for the foot, and injury resulted by reason thereof, the fact remains that these acts of negligence on the part of the patient in no manner concurred with the act of the respondent in burning the foot, if he did so. It would be a harsh doctrine to say that a patient cannot recover for malpractice if any subsequent or independent act of negligence on her part increases or augments the injury caused by the negligence or incompetency of the attending physician; and such is not the law. As said by Agnew, C. J., in *Gould v. McKenna*, 86 Pa. 297, 27 Am. Rep. 705: "The contributory negligence which prevents recovery for an injury is that which co-operates in causing the injury—some act or omission concurring with the act or omission of the Notes of important decisions other party to produce the injury (not the loss merely), and without which the injury would not have happened. A negligence which has no operation in causing the injury, but which merely adds to the damages resulting, is no bar to the action, though it will detract from the damages as a whole." In *Beadle v. Paine*, 46 Ore. 424, 80 Pac. Rep. 906, the court said: "But it will not suffice to defeat the action that the injured party was subsequent negligent, and thereby conduced to the aggravation of the injury primarily sustained at the hands of the physician or surgeon, and such conduct on the part of the patient is pertinent to be shown in mitigation of damages only where enhanced thereby, but not to relieve against the primary liability." See, also, *Carpenter v. Blake*, 75 N. Y. 12; *Du Bois v. Decker*, 130 N. Y. 325, 29 N. E. Rep. 313, 14 L. R. A. 429, 27 Am. St. Rep. 529; *Willmot v. Howard*, 39 Vt. 447, 94 Am. Dec. 338; *Thompson on Negligence*, § 201; 22 Am. & Eng. Ency. of Law, 407. The statement that any injury resulting from the negligent acts of the patient would bar a recovery was also too favorable to the respondent. We are therefore of opinion that there was sufficient evidence of negligence on the part of the respondent to go to the jury, and that the instruction complained of was erroneous.

For this error, the judgment is reversed and a new trial ordered.

Note—Physicians and Surgeons—Malpractice—Negligence.—The physician is bound to use "ordinary," "reasonable" or "proper" care and skill. These terms, however, mean practically the same thing, legally, and require such care

and skill as would be exercised by the ordinarily prudent physician in like cases in the same neighborhood. The physician and surgeon practicing in a sparsely settled rural district is not held to the same degree of skill as the physician practicing in a large city. The physician is not liable for want of the highest degree of skill (*Howard v. Grover*, 28 Me. 97), but for the exercise of ordinary skill; he cannot be required to use his full skill and ability, but only the skill possessed by the average, prudent practitioner under like circumstances, in the neighborhood, or similar locality. *Quinn v. Donovan*, 85 Ill. 194. It has been held that the degree of care and skill required in the performance of a surgical operation is that reasonable degree of care and skill that physicians and surgeons ordinarily exercise in the care of their patients. *Janney v. Housekeeper*, 70 Md. 162. A physician must exercise a reasonable degree of care and professional skill, and what that is must be determined in each case from the circumstances. And regard is to be had to the advanced state of the profession at the time. *Braunberger v. Cleis* (Pa.), 4 Am. L. Reg. (N. S.) 587.

The liability of the physician and surgeon attaches where he fails and neglects to exercise the degree of care and skill ordinarily exercised by physicians under like circumstances in the community or in similar communities. He also would be liable in cases where injury had resulted from prescriptions improperly given containing injurious ingredients; he would also be liable for neglect or failure to visit a patient as the exigencies of the case might require, while under his care, and his liability continues until his professional relationship terminates.

While it is not the policy of the law to throw obstacles in the path of progress yet new devices and methods of treatment must be used with caution. In the principal case the destructive effects of the X-ray burn were apparent long before the treatment was discontinued and the physician should have recognized this danger signal and discontinued the treatment. Failing to watch the indications and conduct the treatment accordingly is held to be negligence. As is well said, the Roentgen Ray is an agency which is little understood but known to be dangerous under certain conditions. At the time of treatment this was the state of knowledge with regard to X-ray therapy and therefore this agency should have been used with great caution. See *Mitchell v. Hindman*, 47 Ill. App. 431. Affirming 150 Ill. 538; *Gobel v. Dillon*, 86 Ind. 327; *Carpenter v. McDavitt*, 53 Mo. App. 393. The cases on this subject are presented in a note to *Whitsell v. Hill*, Iowa, reported in 37 L. R. A. 830.

NEWS ITEM.

ANNUAL MEETING OF THE AMERICAN BAR ASSOCIATION.

The thirty-first annual meeting of the association will be held at Seattle, Washington, on Tuesday, Wednesday, Thursday and Friday, August 25, 26, 27 and 28, 1908.

The sessions of the association will be at 10 o'clock a. m. and 8 o'clock p. m. on Tuesday, Wednesday and Thursday, and at 10 o'clock a. m. on Friday. The sessions of the section of

legal education will be on Wednesday and Thursday afternoons, August 26 and 27, at 3 o'clock p. m. The sessions of the section of patent, trade-mark and copyright law will be on Tuesday and Wednesday, August 25 and 26, at 3 o'clock p. m.

On Monday, August 24, at 3 o'clock p. m., there will be a meeting of the comparative law bureau. On Tuesday, August 25, at 3 o'clock p. m., and on such other dates as may be determined upon at Seattle, there will be meetings of the association of American law schools. The eighteenth conference of commissioners on uniform state laws will begin its sessions on Friday, August 21, at 10 o'clock a. m., being Friday of the week previous to the meeting of the American Bar Association.

The place of holding the various meetings will be announced at Seattle. The reception room will be at the New Washington Hotel.

Programme of the Association.

Tuesday morning, 10 o'clock.—The president's address, by J. M. Dickinson, of Illinois, communicating the most noteworthy changes in statute law on points of general interest, made in the several states and by congress during the preceding year. Nomination and election of members, election of the general council, report of the secretary, report of the treasurer, report of the executive committee.

Tuesday evening, 8 o'clock.—A paper by C. H. Hanford, United States District Judge for the District of Washington, on "National Progression; and the Increasing Responsibilities of Our National Judiciary." A paper by Edgar H. Farrar, of Louisiana, on "The Extension of Admiralty Jurisdiction by Judicial Interpretation." Discussion upon the subjects of the papers read.

Wednesday morning, 10 o'clock.—The annual address by George Turner, ex-United States Senator from the State of Washington. Reports of standing committees. (See report of 1907, page 877, giving a memorandum of subjects referred): On Jurisprudence and Law Reform, On Judicial Administration and Remedial Procedure, On Legal Education and Admissions to the Bar, On Commercial Law, On International Law, On Grievances, On Obituaries, On Law Reporting and Digesting, On Patent, Trade-mark and Copyright Law, On Insurance Law, On Taxation, On Uniform State Laws, Report of Comparative Law Bureau.

Wednesday evening, 8 o'clock.—A paper by Frederick Bausman, of Washington, on "Whether Our Laws are Responsible for the Increase of Violent Crime." Discussion upon the subject of the paper read. Unfinished standing committee reports.

Thursday morning, 10 o'clock.—Unfinished standing committee reports. Reports of special committees. (See report of 1907, page 878): On Classification of the Law, On Indian Legislation, On Penal Laws and Prison Discipline, On Federal Courts, On Title to Real Estate, On Code of Professional Ethics, On Proposed Copyright Bill, On Proposed Lawyers' Home. To suggest remedies and formulate proposed laws to prevent delay and unnecessary cost in litigation.

Thursday evening, 8 o'clock.—Unfinished special committee reports.

Friday morning, 10 o'clock.—Nomination of officers, unfinished business, miscellaneous business, election of officers.

The annual dinner will be given by the association at 8 o'clock on Friday evening. A charge

of \$5 for dinner tickets will be made to each member and delegate.

A room in the New Washington Hotel will be open as a reception room for the use of members of the association and delegates during the meeting.

Entertainment.

At the conclusion of the meetings a two-days' trip will be given to the members and delegates around Puget Sound, the Bay of Georgia and the Straits of Juan de Fuca, stopping at Vancouver, Victoria, Port Angeles, Port Townsend and Tacoma.

Hotel Accommodations.

The New Washington Hotel, Second avenue between Stewart and Virginia streets, will be read as the place of meeting but not for the accommodation of guests. The principal hotels are the Butler, Butler Annex, Savoy, Rainier Grand, Perry and Lincoln. All the hotels are conducted on the European plan.

Mr. Walter McClure, whose address is Alaska Building, Seattle, Washington, is chairman of the committee on accommodations. Reservations should be made several weeks in advance. Programme of the Section of Legal Education.

The sessions will be held on Wednesday and Thursday afternoons, August 26 and 27, at 3 o'clock.

Wednesday afternoon.—Address by the chairman of the section, Samuel Williston, Professor of Law, Harvard Law School, on "The Necessity of Idealism in Teaching Law." A paper by William Schofield, Justice of the Superior Court of Massachusetts, on "The Relation of the Law Schools to the Courts." Discussion upon the subjects of the papers read.

Thursday afternoon.—A paper by Karl von Lewinski, Amstrichter, Berlin, on "The Education of a German Lawyer." A paper by Andrew A. Bruce, Dean of the College of Law, University of North Dakota, and Chairman of the North Dakota Board of Bar Examiners, on "The Relation of State Bar Examiners to the Law School and the Cause of Legal Education." Discussion upon the subjects of the papers read.

Programme of the Section of Patent, Trade-Mark and Copyright Law.

The sessions will be held on Tuesday and Wednesday afternoons, August 25 and 26, at 3 o'clock. Address of the chairman, Robert S. Taylor, of Fort Wayne, Indiana. A paper will be read by Wallace R. Lane, of Des Moines, Iowa, on "Certain Phases of a Patentee's Prima Facie Rights. I. On Demurrer for Want of Patentability. II. As to Circularizing in Patent Litigation." Papers will also be read by J. Nota McGill of Washington, District of Columbia, and Douglas Dyrenforth of Chicago, Illinois. A discussion on the papers will follow.

Programme of the Comparative Law Bureau.

The first annual meeting will be held at the New Washington Hotel, Seattle, Washington, on Monday, August 24, at 2.30 o'clock p. m. Annual address of the director, Simeon E. Baldwin, of New Haven, Connecticut. Reading of report to American Bar Association. Germane topical discussions. Membership and participation at the meeting are classified as follows: Class A. All members of the American Bar Association. Class B. State Bar Associations, by three delegates each. Class C. Members of the Association of American Law Schools, by two delegates each. Class D. Law schools and law libraries, by two delegates each. Class E. Institutions

of learning, city and county bar Associations, by two delegates each. Class F. Individual lawyers who are not members of the American Bar Association, by personal attendance. Programme of the Association of American Law Schools.

The ninth annual meeting will be held at the New Washington Hotel, Seattle, Washington, on Tuesday, August 25, 1908, and and such other dates as may be there determined upon. Annual address of the president of the Association of American Law Schools, by George W. Kirchwey, Dean of the Columbia University Law School. A paper by Dr. David Starr Jordan, President of the Leland Stanford, Jr., University, on "The Relation of the Law School to the University." Discussion upon the subjects of the papers read. Business meeting of the association. Conference of Commissioners on Uniform State Laws.

The eighteenth conference will be held at the New Washington Hotel, Seattle, Washington, beginning August 21, 1908, at 10 o'clock a. m. All members of the American Bar Association, and particularly the members of the Committee on Uniform State Laws of the American Bar Association, as well as the representatives of commercial or other bodies, interested in uniform laws relating to bills of lading, stock certificates, partnership or any other uniform laws which may be the subject of consideration by the conference, are cordially invited to attend and to take part in the preparation, examination and discussion of bills relating to those matters.

JETSAM AND FLOTSAM.

POETRY AND THE LAW.

A copy of the opinion of the Supreme Court of Missouri in the case of Mancil G. Cook v. Laura A. Newby and others, has just reached Trenton, in which opinion Judge Lamm, in the course of the written opinion of the Supreme Court, discloses his peculiar literary attainments, which have adorned so many of the recent opinions of the Supreme Court of Missouri.

This case involved the ownership of 120 acres of valuable land near McFall, Gentry county, Missouri. This farm had been conveyed by a warranty deed to Laura A. Newby and her husband, John H. Newby. At the trial in the Circuit Court Judge W. C. Ellison set aside the deed to the Newbys and decided that Mancil G. Cook was the owner of this farm.

The Supreme Court reversed this decision of Judge Ellison and remanded the case, with directions to enter a judgment in favor of the Newbys.

In discussing the briefs of the attorneys, Judge Lamm used the following language:

"We now come to a phase of the case, eyed at first a little askance, and then critically. Whatever value it has is in showing how one taper lights another in briefs, as in the world at large. It shows, too, how difficult in a close matter it is to determine the proximate cause of things—or the probable result of a given cause. Possibly, its force is somewhat spent in disclosing what hidden pitfalls lurk in the primrose paths diverging from the beaten way in brief-making for appellate courts. As way-

farers in the main-traveled highway of the law we shall set it down to point its own moral, thus:

Appellants' scholarly counsel close a good brief in chief with a short and modest flight of fancy—a borrowed apostrophe to Justice—by poetical license dressed in singular phrase, viz.: 'For Justice

All place a temple, and all season summer.'

"Now, *prima facie*, is this aught but an innocent and mild invocation to serenity of judicial temper? Is it more than a wholesome effort to key up the mind of the court to a notch of high thinking? Inquiring students in the law recall the unexpected and anxious result produced by throwing the squib in the celebrated Squib case. But mark the novel result here. The very innocency of the apostrophe's face was taken as a mask hiding evil contrivances. So it was that the very blandness of the countenance of Mr. Harte's 'Heathen Chinee' (in the case of William Nye) hid like evil. Apparently nettled by its use, learned counsel for respondent condemn appellants' brief by and large. Bethinking themselves of the time when Iago tripped good Michael Cassio into mischief by a night's revel, they designate the brief in Cassio's description of the events of that woeful night as, viz.:

'A mass of thinges . . . but nothing wherefore.'

Not only so, but counsel fail upon the (to us) unknown author of the apostrophe with heated epithet. They belabor him roundly, though dead. They say he was the 'great agnostic and prince of plagiarists.' They say the first part of the apostrophe was 'cribbed from a heathen poet' without giving due credit. They say its concluding phrase is of such 'occult meaning that no one so far as our knowledge extends has had the hardihood to asseverate that it is within his ken.'

They conclude a trenchant and sprightly printed argument with a beautiful poetical apostrophe to the Bible, most becoming and tenderly reverential, and then (by way of sharp contrast) darkly hint that appellants' apostrophe comes from a sinister source, to-wit, Pain, Volney or Voltaire—winding up by laying down certain sacred ethical precepts, which, they insist, announce the right doctrine to apply to the facts of the record.

Thus, sorely pricked, appellants' counsel (drawing from the well of the drama) retort in their reply brief in the words of Bassanio's comment on the caskets (made to himself—see Merchant of Venice, Act III, sec. 2) viz:

'In law, what plea so tainted and corrupt,
But, being seasoned with a gracious voice,
Obscures the show of evil? In religion
What damned error but some sober brow
Will bless it, and approve it with a text,
Hiding the grossness with fair ornament.'

So much, for the matter. We take leave of it with this observation: Whatever the issue raised, it is not one of fact or law. We refuse to meddle with it on this appeal, and hence, leave it to a forum, if any, having jurisdiction to try it out."

BOOK REVIEWS.

BEVAN ON THE LAW OF NEGLIGENCE. .
The author, Thomas Bevan, of the Inner Tem-

ple, Barrister-at-Law, states that the preparation of this revision has occupied the greater portion of his time for some three or four years, and that he has not only sought to bring his treatise up to date, but to present the new problems which have now to be dealt with. As to the importance of this branch of law, and its development, the author speaks as follows: "Discussions on questions of negligence are of daily occurrence in the courts; since the tendency of the law freed from technical fetters is to base claims on breach of duty rather than on some more refined or recondite reason; while the increasing complexity of social relations in modern life accentuates immensely the occasions of conflict, whether intentional or not, between those whose interests or rights are converging but not identical. A large proportion of, though not nearly all, the 1,465 new cases introduced into this book, is due to this expansion of the subject and is the growth of ten years of active legal work. The residue is to be put down to what was providently omitted before, or what is material for new exemplification or is of historical interest."

There is in all the law no more interesting a study than that of the law of negligence, certainly none more important. This branch of law, necessarily restricted and obscure in its origin, has developed with our advancing civilization. It is only in the last few decades, however, that it has forged to the front as one of the most important branches of the law. This has been due to the great industrial expansion of recent times. The old principles have been applied to new conditions, have been refined and expanded, and in some instances, laid aside, or repudiated as not being applicable to present day conditions.

The author of this work has stated the principles clearly, and has shown their origin, expansion and growth to the present day.

The presentation is scholarly, the arrangement logical. While he cites and quotes freely from the adjudicated cases, he has not fallen a victim of the case law habit, but presents the law as it is, criticising the adjudication where necessary and contrasting and analyzing.

While the author is an Englishman, his effort has been to present the Law of Negligence of England, America and the Colonies. He recognizes the high standing of the American courts and cites their decisions freely.

The frequency with which questions involving a consideration of this branch of the law are being raised, renders a treatise of this character a necessity to the practicing attorney. Bevan's book has long been recognized as an authority on this subject. It is in two volumes. Published by Cromarty Law Book Co., Philadelphia.

STIMSON ON FEDERAL AND STATE CONSTITUTIONS.

Those familiar with previous books by this author need no introduction. Professor Stimson is thoroughly qualified to discuss the great subject of constitutional law. In this treatise the subject is presented in a scholarly, concise, and forceful style. The analysis gives an excellent idea of the correlation of the various constitutional provisions, which are also presented in their historical aspect, thereby giving the development and growth of constitutional law. There is a historical study of the chronological origin of the several provisions, also a table of English social legislation, and a comparative

direct of the constitutions of the forty-six states. The effort of the author has been to give the history, origin and present tendency of American constitutions. The thoughtful lawyer must realize that constitutional law is not a dead study, but is a branch of law of the utmost importance, which has been too much neglected in the past. A considerable portion of the litigation now reaching our higher courts involves questions of constitutional law. While decisions of great import have been handed down from time to time, there are great problems yet to be solved.

Professor Stimson has succeeded in treating this subject in one volume and is to be commended for having done such thorough and able work in such a brief compass. The work should be of greater value by reason of its brevity, as the foundation principles are presented in a space that will permit the book to be carefully read by even the busy practitioner.

The book is by Prof. Frederic Jesup Stimson and is published by the Boston Book Company, Boston, Mass.

BOOKS RECEIVED.

A Treatise on Fraudulent Conveyances and Creditors' Remedies at Law and in Equity, including a consideration of the provisions of the bankruptcy law applicable to fraudulent transfers and the remedies therefor, and the procedure of trustees in bankruptcy in actions either in state or federal courts for the recovery of property fraudulently transferred by the bankrupt. By DeWitt C. Moore, of the Johnstown (New York) Bar, Author of "The Law of Carriers." In Two Volumes. Albany, N. Y.: Matthew Bender & Co. 1908. Buckram. Price \$12.00. Review will follow.

The Treaty Power under the Constitution of the United States. Commentaries on the Treaty Clauses of the Constitution; construction of treaties; extent of treaty-making power; conflict between treaties and acts of Congress; state constitutions and statutes; international extradition; acquisition of territory; ambassadors, consuls and foreign judgments; naturalization and expatriation; responsibility of government for mob violence, and claims against governments. With Appendices containing regulations of department of state relative to extradition of fugitives from justice, a list of the treaties in force, with the international conventions and acts to which the United States is a party, and a chronological list of treaties. By Robert T. Devlin, of the San Francisco Bar, Author of "A Treatise on the Law of Deeds." San Francisco: Bancroft-Whitney Company, Law Publishers and Law Booksellers. 1908. Sheep. Price \$6.00. Review will follow.

The Commerce Clause of the Federal Constitution. By Frederick J. Cooke, of the New York Bar. Author of "The Law of Life Insurance," "The Law of Trade and Labor Combinations," etc. New York. Baker, Voorhis & Company. 1908. Buckram. Price \$4.50. Review will follow.

Cyclopedia of Law and Procedure. William Mack, LL.D., Editor-in-Chief. Volume XXVIII. New York. The American Law Book Company. London: Butterworth & Co., 12 Bell Yard. 1908. Review will follow.

The American State Reports, containing the Cases of General value and authority subsequent to those contained in the "American Decisions"

and the "American Reports," decided in the courts of last resort of the several states. Selected, Reported and Annotated by A. C. Freeman. Volume 119. San Francisco: Bancroft-Whitney Company, Law Publishers and Law Booksellers. 1908. Review will follow.

HUMOR OF THE LAW.

Speaking of the perversity of country "squires," State Senator John S. Fisher, chairman of the Pennsylvania Capitol Investigation Commission, told this story recently:

"We have one old codger out in Indiana county who fears neither lawyer nor court. Not long ago Dick Wilson had a case before the 'squire,' and, knowing his man, he went to the office fortified with a dozen or more Supreme Court decisions.

"Wilson argued his case, cited several opinions, and finally remarked: 'Squire, I have here some decisions by the Supreme Court of Pennsylvania which I shall read.'

"Wilson finished one decision when the justice interrupted, saying:

"Mr. Wilson, I reckon you've read enough. Those Supreme Court decisions are all right so far as they go, but if the Supreme Court has not already reversed itself I have no doubt that it will do so in the near future. Judgment is therefore given against your client."—Philadelphia Public Ledger.

WEEKLY DIGEST.

Weekly Digest of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort and of all the Federal Courts.

California,	4, 10, 11, 14, 25, 35, 41, 51, 64, 70, 72, 83, 93, 96, 98, 103, 106, 113, 127, 130, 136.
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Georgia 133
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Kansas 17, 36, 45, 55, 65, 66, 71, 94
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Minnesota 3, 23, 91, 109, 110, 129
Montana 26, 111
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New Jersey 32, 47
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Oklahoma 1, 13, 24, 28, 44, 58, 63, 68, 112, 116
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Washington 8, 56, 74, 82, 92, 104, 107, 115, 138
Wisconsin,	2, 16, 18, 21, 29, 33, 34, 43, 85, 105, 119.
Wyoming 5, 20, 52, 61, 99, 100, 141

1. **Acknowledgment**—Persons Entitled to Take.—A deed of trust by a corporation, acknowledged before a notary public who was an officer thereof and indebted to it, held entitled

to registration.—Ardmore Nat. Bank v. Briggs Machinery & Supply Co., Okl., 94 Pac. Rep. 533.

2. **Account Stated**—Estoppel.—An account stated held not conclusive unless the account is affected by a consideration or by an estoppel.—Segelke & Kohlhaus Mfg. Co. v. Vincent, Wis., 115 N. W. Rep. 806.

3. **Action**—Legal and Equitable.—An equitable cause of action may be united with a legal cause of action.—Disbrow v. Creamery Package Mfg. Co., Minn., 115 N. W. Rep. 751.

4. **Adjoining Landowners**—Excavations.—The fact that the owner of a building undertook to construct a foundation wall under it to comply with the requirements of a city ordinance did not release the adjoining landowner, who undertook to construct a wall by the side of it extending from six to nine feet deeper, from the duty to so construct his wall as to retain the premises on which the building stood.—Hedstrom v. Union Trust Co., Cal., 94 Pac. Rep. 386.

5. **Appeal and Error**—Bill of Exceptions.—It is only after an order has been made requiring a rearrangement and numbering of the pages of a transcript, and that order has not been complied with, that the cause will be dismissed in the discretion of the court on the ground that the pages of the transcript are not properly arranged and numbered.—Weidenhoff v. Primm, Wyo., 94 Pac. Rep. 453.

6.—**Damages**—Defendant, in an action for injuries to a child caused by being struck by a street car, held not entitled to a reversal, because of the court's failure to instruct the jury that they must limit plaintiff to such loss of earning capacity as would ensue after he had reached his majority.—Rollo v. City Electric Ry. Co., Mich., 115 N. W. Rep. 727.

7.—**Dismissal**—Where appeal of original appellant from a decree necessarily determines all the questions presented by the record, a motion to dismiss as to other appellants will not be considered.—Whedon v. Lancaster County, Neb., 114 N. W. Rep. 1102.

8.—**Harmless Error**—Any error in sustaining a demurrer to an affirmative defense is harmless where the only evidence defendant could introduce thereunder is admissible under the general denials.—Owen v. Casey, Wash., 94 Pac. Rep. 473.

9.—**Instructions**—Where plaintiff's counsel made a statement in argument, which defendant objected to, and asked the court to instruct the jury to ignore, but did not except to the court's failure to do so, the question may not be considered on appeal.—Bennett v. Greenwood, Mich., 114 N. W. Rep. 1019.

10.—**Negligence**—In an action for personal injuries resulting from the alleged negligence of defendant in maintaining dangerous premises, on the question whether defendant violated any duty it owed to plaintiff, the court will consider the case in the light of the inferences most favorable to plaintiff's contention for which there is substantial support in the evidence.—Grant v. Sunset Telephone & Telegraph Co., Cal., 94 Pac. Rep. 368.

11.—**Pleading**—Where the complaint is uncertain, but it is apparent from the record that defendants were not thereby misled or embarrassed in making their defense, the overruling of a demurrer in the complaint is not ground for reversal.—Hudner v. Sawday, Cal., 94 Pac. Rep. 424.

12.—**Questions of Fact.**—A verdict on conflicting testimony will not be disturbed on appeal, unless it is clearly wrong.—*Stratton Cripple Creek Mining & Development Co. v. Ellison*, Colo., 94 Pac. Rep. 303.

13.—**Scire Facias.**—Where a writ of scire facias is asserted to have been issued within ten years after the cause of action accrued, the supreme court cannot say that petition for revival after such time is an amendment of such writ, or a continuation of such action, when neither the writ nor the terms thereof are set out in the record.—*Noyes v. French*, Okl., 94 Pac. Rep. 546.

14.—**Theory of Cause.**—Where an issue of agency was tried in good faith without objection in the trial court, a judgment would not be reversed because such issue was not tendered by the complaint.—*Mabry v. Randolph*, Cal., 94 Pac. Rep. 403.

15.—**Appearance.**—Proceedings Constituting.—Defendant by pleading the general issue thereby submits himself to the court's jurisdiction, and, even though a plea in abatement as to other defendants is sustained, it does not affect the jurisdiction as to him.—*Rosenthal v. Rosenthal*, Mich., 115 N. W. Rep. 729.

16.—**General and Special Appearance.**—A motion by defendant to amend the return to the summons to conform to the facts held inconsistent with want of jurisdiction of his person by the court so as to amount to a general appearance.—*Bestor v. Intercounty Fair*, Wis., 115 N. W. Rep. 809.

17.—**Attorney and Client.**—Contract for Services.—An agreement between a client and his attorneys for services of the latter, wherein it is agreed that the client shall not settle or otherwise dispose of the cause of action without the written consent of the attorneys, is contrary to public policy, and void.—*Kansas City Elevated Ry. Co. v. Service*, Kan., 94 Pac. Rep. 262.

18.—**Bail.**—Deposit in Lieu of Bail.—The court held not authorized to require one disbursing cash bail by the authority of accused to pay the money into court for the benefit of another.—*State v. Wisniewski*, Wis., 114 N. W. Rep. 1113.

19.—**Banks and Banking.**—Checks.—A check is not an assignment of the corresponding amount of the drawer's fund in the hands of the bank, and gives the payee no right of action against the same.—*Tibby Bros. Glass Co. v. Farmers' & Mechanics' Bank of Sharpsburg*, Pa., 69 Atl. Rep. 280.

20.—**Compensation of Receiver.**—In a suit by the state to dissolve a bank under Rev. St. 1899, sec. 3101, the court held not entitled to fix the entire compensation of the receiver until all the services had been performed, and his final report approved.—*Riordan v. Horton*, Wyo., 94 Pac. Rep. 448.

21.—**Bastards.**—Credibility of Complainant.—In bastardy, the question whether complainant resisted accused to the degree testified to by her held to affect her credibility only.—*Douglass v. State*, Wis., 114 N. W. Rep. 1121.

22.—**Bills and Notes.**—Negotiability.—A stipulation on the back of a note at execution that it was secured by a mortgage, and that the payee would look to mortgage security for its payment, became a part of the note, and rendered it non-negotiable.—*Allison v. Hollembeak*, Iowa, 114 N. W. Rep. 1059.

23.—**Presentment.**—Drawer of a check, not having been accepted as unconditional payment, is liable to the owner, where by its loss presentment to the bank is rendered impossible.—*First Nat. Bank v. McConnell*, Minn., 114 N. W. Rep. 1129.

24.—**Cancellation of Instruments.**—Fraud.—In an action for rescission and cancellation of a deed fraudulently obtained, an allegation that plaintiffs are ready and willing to execute a deed to the land traded for to defendants is a sufficient offer to restore within Wilson's Rev. & Ann. St. 1903, sec. 827.—*Clark v. O'Toole*, Okl., 94 Pac. Rep. 547.

25.—**Laches.**—Though a suit to rescind certain instruments on the ground of fraud was not brought until almost a year after plaintiff's discovery of the fraud, the delay held not laches, under Civ. Code, sec. 1691.—*Richards v. Farmers' & Merchants' Bank*, Cal., 94 Pac. Rep. 393.

26.—**Carriers.**—Carriage of Freight.—A carrier in accepting shipments accepts them subject to the liabilities imposed by law; and the only way in which it can vary the liability is by special contract.—*Russell v. Chicago, B. & Q. Ry. Co.*, Mont., 94 Pac. Rep. 488.

27.—**Injury to Alighting Passenger.**—Where a passenger is unable to leave the car without assistance and the conductor promises to assist her, the company will be liable for injuries sustained in her attempt to leave the car without assistance.—*Mercer v. Cincinnati Northern R. Co.*, Mich., 115 N. W. Rep. 733.

28.—**ChamPERTY and Maintenance.**—Grants of Land Held Adversely.—Under 1 Wilson's Rev. & Ann. St. 1903, sec. 2111, making a person taking a conveyance of land while the same is the subject of a suit guilty of a misdemeanor, a deed held not void unless the person taking the same knew of the suit.—*Jennings v. Brown*, Okl., 94 Pac. Rep. 557.

29.—**Commerce.**—Soliciting Orders.—Soliciting orders or making a contract for the sale of goods in one state, and which by the order or contract are to reach the purchasers in another, held an inherent part of the commerce consisting of the whole transaction.—*Loverin & Browne Co. v. Travis*, Wis., 115 N. W. Rep. 829.

30.—**Conspiracy.**—Contract Induced by Conspiracy.—In an action to recover money paid on a contract which defendants wrongfully conspired to induce plaintiff to make, it was immaterial by which one of defendants she was actually influenced in making the contract.—*Aughey v. Windrem*, Iowa, 114 N. W. Rep. 1047.

31.—**Evidence.**—In a suit for conspiring to prevent plaintiff's husband from living with her until she redeeded land deeded to her in settling a suit for alienation of her affections, what was said and done between defendants at the time of such settlement held admissible to show they were acting together.—*Rosenthal v. Rosenthal*, Mich., 115 N. W. Rep. 729.

32.—**Constitutional Law.**—Equal Protection of the Law.—Act April 5, 1906 (P. L. 1906, p. 121), held not to violate the fourteenth amendment of the federal constitution.—*United New Jersey R. & Canal Co. v. Parker*, N. J., 69 Atl. Rep. 239.

33.—**Privileges and Immunities.**—The power to impose conditions on granting to a foreign corporation the privilege of doing busi-

ness in a state held not restrained by Const. U. S. Amend. 14, sec. 1, providing that no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.—*Loverin & Browne Co. v. Travis, Wis.*, 115 N. W. Rep. 829.

34. **Contracts—Agreement for Benefit of Third Party.**—Where a contract is made for the benefit of a third party, he may enforce it when he is informed of its existence, whether he was ascertained when the contract was made or not.—*R. Connor Co. v. Olson, Wis.*, 115 N. W. Rep. 811.

35. **Construction.**—Where a pleaded instrument is, because of the uncertainty of its language, susceptible of more than one construction as to its nature or as to the purpose intended by the parties to be attained by it, the construction of the party pleading it should be accepted, if such construction be reasonable, where the essential facts stated in the complaint are at least *pro re nata* admitted to be true.—*Richards v. Farmers' & Merchants' Bank, Cal.*, 94 Pac. Rep. 393.

36. **Counties—Criminal Prosecutions.**—Where a change of venue is taken in a criminal case, and the county from which the change is made is liable to the county to which the change is made for expenses incurred, and the commissioners of the county in which the trial was had have paid fees and expenses, it may maintain an action against the other county to recover therefor.—*Board of Commissioners of Cheyenne County v. Board of Commissioners of Norton County, Kan.*, 94 Pac. Rep. 278.

37. **Courts—Adjudications.**—The court of appeals, where the question involved is one depending entirely on the evidence, will merely announce its conclusion.—*McCabe v. Brosenne, Md.*, 69 Atl. Rep. 259.

38. **Stare Decises.**—Where a rule as to a matter of form and procedure has been adopted in former decisions of the supreme court, it should be followed.—*Murphy v. Willow Springs Brewing Co., Neb.*, 115 N. W. Rep. 761.

39. **Criminal Law—Disorderly Houses.**—The keeper of a disorderly house who enters into a criminal agreement with a public officer to pay certain money at stipulated times as a consideration for carrying on his business held an accomplice.—*State v. Routzahn, Neb.*, 115 N. W. Rep. 759.

40. **Parties Entitled to Allege Error.**—Where a tenant and his landlord were charged with maintaining a nuisance, and the evidence showed the tenant alone guilty, error in convicting the tenant jointly with the landlord was not prejudicial to the tenant.—*People v. Kent, Mich.*, 114 N. W. Rep. 1012.

41. **Time for Taking Appeal.**—Under Pen. Code, secs. 1239, 1240, held that an appeal may be taken before the judgment or order appealed from is entered.—*People v. Schmitz, Cal.*, 94 Pac. Rep. 407.

42. **Criminal Trial—Instructions.**—Where the only witnesses to the commission of an offense by accused were accomplices, the court erred in refusing to give a cautionary instruction as to their credibility.—*O'Brien v. People, Colo.*, 94 Pac. Rep. 284.

43. **Remarks of Counsel.**—Where no particular language of the counsel for the state in his argument in *bastardy* was called to the attention of the court, no reversible error on

the ground of improper remarks was shown.—*Douglass v. State, Wis.*, 114 N. W. Rep. 1121.

44. **Venue.**—An indictment for murder after the admission of Oklahoma for an offense committed under the territory held cognizable in the district court in the county in which the offense was committed, under Const. Schedule, secs. 27, 28, and Enabling Act June 16, 1906, sec. 20, c. 3335, 34 Stat. p. 277, as amended by Act March 4, 1907, c. 2911, 34 Stat. p. 1287.—*Ex parte Bailey, Okl.*, 94 Pac. Rep. 553.

45. **Damages—Anticipated Profits.**—Anticipated profits may be allowed as damages on the breach of contract, where the business is not a new one, and a safe basis can be found on which to estimate them.—*Fredonia Gas Co. v. Bailey, Kan.*, 94 Pac. Rep. 258.

46. **Failure to Submit to Physical Examination.**—In actions for personal injuries, an order of the court directing plaintiff to submit to a physical examination before the trial will be enforced by staying or dismissing the action, and not by punishment as for contempt.—*Western Glass Mfg. Co. v. Schoeninger, Colo.*, 94 Pac. Rep. 342.

47. **Temporary Injury to Real Estate.**—Where injury to real estate is only temporary and removable, depreciation in the market value of the land cannot be considered.—*Doremus v. City of Paterson, N. J.*, 69 Atl. Rep. 225.

48. **Death—Negligence.**—In an action for the death of one killed by falling rocks while descending a manway in a mine, evidence held to support a finding that decedent was killed by falling rock because of negligence of the employer to properly timber up the way.—*Hotchkiss Mt. Mining & Reduction Co. v. Bruner, Colo.*, 94 Pac. Rep. 331.

49. **Deeds—Undue Influence.**—Where a grantor is capable of understanding the nature and consequence of his conveyance, mere weakness of mind, not taken advantage of by fraud or undue influence, is insufficient to justify setting it aside.—*Altig v. Altig, Iowa*, 114 N. W. Rep. 1056.

50. **Descent and Distribution—Advancements.**—Whether a gift by a parent to a child is an advancement or an absolute gift held to depend on the intention of the parent.—*McCabe v. Brosenne, Md.*, 69 Atl. Rep. 259.

51. **Discovery—Physical Examination.**—Defendant held to have no absolute right to demand physical examination of plaintiff; a motion therefor being allowed in the sound discretion of the trial court, which is reviewable on appeal.—*Western Glass Mfg. Co. v. Schoeninger, Colo.*, 94 Pac. Rep. 342.

52. **Divorce—Alimony.**—The supreme court in the exercise of its appellate jurisdiction may hear a motion by a wife in an action for divorce for support and allowance for expenses in proceedings brought up on error.—*Duxstad v. Duxstad, Wyo.*, 94 Pac. Rep. 463.

53. **Elections—Registration Committee.**—The failure to appoint registration committees on the 1st day of July, 1906, as expressly required by registration law (Laws 1905, p. 188, c. 100), does not, after the amendment of 1907, affect the validity of appointments of registration committees within the time prescribed by the Act 1907, p. 321, c. 147.—*People v. Earl, Colo.*, 94 Pac. Rep. 294.

54. **Electricity—Contributory Negligence.**—

Where one heedlessly brings himself in contact with an electric wire and is injured, his contributory negligence will defeat recovery.—*Haertel v. Pennsylvania Light & Power Co.*, Pa., 69 Atl. Rep. 282.

55. **Eminent Domain**—Compensation.—Where plaintiff owned two city blocks, comprising part of an addition to a city, which were fenced with two others, making a tract of about eight acres, the railroad company could not insist that the owner treat his entire holding as a farm to minimize his damages.—*Missouri, K. & T. Ry. Co. v. Roe*, Kan., 94 Pac. Rep. 259.

56.—**Riparian Rights**—Legislation authorizing taking or damage of riparian rights held in contravention of Const. art. 1, sec. 16, prohibiting the taking of private property without compensation.—*Kalama Electric Light & Power Co. v. Kalama Driving Co.*, Wash., 94 Pac. Rep. 469.

57. **Equity**—Enforcement of Trust.—Where a daughter delivers a deed to her father in trust under an oral contract, and the trust was not carried out, equity will enforce it, whether the constructive fraud was intentional or not.—*Cardiff v. Marquis*, N. D., 114 N. W. Rep. 1088.

58. **Estoppel**—Ratification of Acts of Others.—Deed made pending suit to cancel deed to grantor held valid and grantor's grantor estopped by ratification to assail the same.—*Jennings v. Brown*, Okl., 94 Pac. Rep. 557.

59. **Evidence**—Extrinsic Evidence.—In an action to recover money advanced on a contract of sale, extrinsic evidence as to intention of parties held admissible.—*Prowers v. Nowles*, Colo., 94 Pac. Rep. 347.

60.—**Insanity**—Evidence of a non-expert is equally as competent as that of an expert on an issue of sanity.—*Weber v. Della Mountain Min. Co.*, Idaho, 94 Pac. Rep. 441.

61.—**Presumptions**—Where cohabitation is admitted to have been illicit in the beginning, it is presumed to have continued illicit until the contrary is shown.—*Weidenhoft v. Primm*, Wyo., 94 Pac. Rep. 453.

62.—**Parol Evidence**—Where defendants in writing agreed to pay plaintiff a commission for selling their tangible properties, a contemporaneous oral agreement may be shown whereby they agreed to pay him the same commission for the sale of the capital stock of the company.—*Wells v. Hocking Valley Coal Co.*, Iowa, 114 N. W. Rep. 1076.

63. **Execution**—Validity of Judgment.—Where the sheriff seeks, in replevin, to justify the seizure under an execution issued in another case, he must prove a valid judgment before he can attack a transfer of the property in fraud of creditors.—*Cockell v. Schmitt*, Okl., 94 Pac. Rep. 521.

64. **Extortion**—What Constitutes.—Under Pen. Code, sec. 519, to constitute extortion, held the injury threatened must be in itself unlawful, irrespective of the purpose with which the threat is made.—*People v. Schmits*, Cal., 94 Pac. Rep. 407.

65. **Fire Insurance**—Action Against Agent.—In an action to recover damages for loss of property by fire, on the ground of failure of defendants, insurance agents, to carry out an oral contract to insure the same, evidence held insufficient for recovery.—*Mooney v. Merriam*, Kan., 94 Pac. Rep. 263.

66. **Fraud**—Evidence.—In an action to re-

cover the value of cattle alleged to have been obtained by fraud, evidence examined, and held to show that the cattle were obtained from plaintiff by defendant's fraudulent representations, upon which plaintiff relied.—*Murray v. Davies*, Kan., 94 Pac. Rep. 283.

67. **Garnishment**—Claims by Third Persons.—In garnishment in which a third person claimed the property in the hands of the garnishee, a judgment held merely to adjudge that the third person had no title to the property.—*Toner v. Toner*, Mich., 115 N. W. Rep. 712.

68. **Grand Jury**—Drawing Jurors.—Jury box held not prepared in accordance with Wilson's Rev. & Ann. St. 1903, c. 46, sec. 6 (section 3313), and a grand jury drawn from said box is illegal, and an indictment returned by such jury should be set aside.—*McGinley v. Territory*, Okl., 94 Pac. Rep. 525.

69. **Highways**—Drainage of Highways.—The highway authorities have a legal right in making highway improvements to make a ditch along the roadbed, and thereby render the highway less accessible to an abutting owner who cannot recover for the injuries sustained.—*Dean v. Highway Commissioner for Tallmadge Tp.*, Mich., 115 N. W. Rep. 739.

70. **Homestead**—Enforcement of Right.—In a suit to quiet title, where plaintiff claimed title under a declaration of homestead by his grantor, evidence examined, and held sufficient to warrant the finding by the trial court that at the time the homestead was declared persons visited the house for the purpose of prostitution.—*Harlan v. Schulze*, Cal., 94 Pac. Rep. 379.

71.—**Existence of Right**—When the homestead character has once attached, it may remain for the benefit of the sole surviving member of the family.—*Weaver v. First Nat. Bank*, Kan., 94 Pac. Rep. 273.

72.—**Occupancy and Use**—In an action to quiet title, the evidence examined, and held insufficient to show that the property was used by plaintiff's grantor at the time of making her declaration of homestead primarily as a house for carrying on the business of prostitution, so as to prevent its being declared a homestead.—*Harlan v. Schulze*, Cal., 94 Pac. Rep. 379.

73. **Husband and Wife**—Ante-Nuptial Agreements.—The marriage of the parties to an ante-nuptial agreement is a mutual and adequate consideration for the promises therein contained.—*Nesmith v. Platt*, Iowa, 114 N. W. Rep. 1053.

74.—**Community Property**—Where a divorce was granted without any disposition of the community property, the parties were thereafter tenants in common thereof.—*Graves v. Graves*, Wash., 94 Pac. Rep. 481.

75.—**Separate Maintenance**—The district court has jurisdiction of a suit by a wife for separate maintenance independently of a divorce action or of a criminal proceeding for the husband's failure to provide reasonable support.—*Austin v. Austin*, Colo., 94 Pac. Rep. 309.

76. **Indians**—Status of Indian Nations.—Members of the Sisseton band of Sioux Indians allowed to take lands in severalty are wards of the government, which had the right to impose such terms as to the proceeds of the sale of such lands as it might deem proper.—*Minder v. First Nat. Bank*, S. D., 114 N. W. Rep. 1094.

77. **Indictment and Information**—Statutory

Offenses.—Where ownership is required to be alleged in an indictment, an allegation of possession is usually sufficient, and to allege that a train was on the track of a designated railway company is to charge possession in the railway company named.—*State v. Leasman*, Iowa, 114 N. W. Rep. 1032.

78. Insane Persons.—Appointment of Guardian.—The heirs apparent of an alleged incompetent may appeal from an order of the county court dismissing their petition for such appointment, under Cobby's Ann. St. 1903, sec. 5384; appeal being allowed in probate matters under section 4823.—*Tierney v. Tierney*, Neb., 115 N. W. Rep. 764.

79. Interstate Commerce.—Exemption from Garnishment.—The fact that an indebtedness due to a non-resident railroad company arose out of the conducting of interstate commerce does not exempt it from garnishment under a foreign attachment.—*Johnson v. Union Pac. R. Co.*, R. I., 69 Atl. Rep. 298.

80. Intoxicating Liquors.—Mulct Tax.—Where a cold storage warehouse in a city was used by one through an agent for the storage of beer until sold and distributed to retailers in the city, the mulct tax must be assessed.—*In re Des Moines Union Ry. Co.*, Iowa, 115 N. W. Rep. 740.

81.—Proceedings to Procure License.—Motion to dismiss appeal on ground that plaintiff, appellant, had by some act estopped or barred himself from prosecuting his appeal, can be taken advantage of only by plea in bar or in abatement, as the case may be.—*Moon v. Hart-suck*, Iowa, 114 N. W. Rep. 1043.

82. Judgment.—Administrator's Settlement.—A finding that an administrator's final account was settled on a certain date does not preclude him from asserting, as an individual, error in a subsequent decree so affecting his relation to the estate.—*In re Sullivan's Estate*, Wash., 94 Pac. Rep. 483.

83.—Default.—Proceedings to set aside default decree held not defective.—*San Diego Realty Co. v. McGinn*, Cal., 94 Pac. Rep. 374.

84. Justices of the Peace.—Jurisdiction.—Where neither of two notes exceed \$100, and each stipulates to give a justice jurisdiction in an action on the note to an amount not exceeding \$300, they cannot be united in one action in justice's court where the combined amount to be recovered exceeds \$100.—*Nauman v. Nauman*, Iowa, 114 N. W. Rep. 1068.

85. Life Insurance.—Beneficiaries.—Beneficiaries have no interest whatever in the sums paid as premiums by the insured to secure a benefit to those entitled to the proceeds of the policy upon maturity; all rights to such sums upon rescission of the contract by the parties being clearly vested in the insured.—*Slosun v. Northwestern Nat. Life Ins. Co.*, Wis., 115 N. W. Rep. 796.

86. Limitation of Actions.—Part Payment.—A debtor who conveyed land by absolute deed to his creditor as security, and thereafter conveyed his equity of redemption to a third person, held not entitled to require the creditor to apply in payment of the debt an amount claimed to be due on a prior transaction.—*McCarron v. Wheeler*, Mich., 114 N. W. Rep. 1028.

87. Malicious Mischief.—Evidence.—Where an indictment for malicious injury to the property of another describes the property as that of a person named, it is sufficient to prove that the

property was in the possession of such person, though he was not the owner.—*State v. Leasman*, Iowa, 114 N. W. Rep. 1032.

88. Mandamus.—Counties.—The duty of the county commissioners to provide for the payment of all claims where the allowance is not absolutely void is a continuing duty, against which limitations is no defense.—*State v. Farrington*, Neb., 114 N. W. Rep. 1100.

89. Master and Servant.—Assumed Risk.—Plaintiff's intestate held not to have assumed the risk of injury from an accident caused by another servant permitting water to come in contact with explosive material, since it was not an ordinary risk which the employees of other departments assumed.—*Charron v. Union Carbide Co.*, Mich., 115 N. W. Rep. 718.

90.—Assumed Risk.—An employer held not liable for the death of an employee who was killed by clay rolling into the pit in which he was shoveling.—*Ritzema v. Valley City Brick Co.*, Mich., 115 N. W. Rep. 705.

91.—Care Required.—Defendants were charged with a high degree of care commensurate with the intrinsically dangerous character of dynamite to guard against injuries to their employees.—*Anderson v. Smith*, Minn., 115 N. W. Rep. 743.

92.—Cause of Injury.—In an action for the death of a servant, the court should have directed a verdict for defendant; there being no evidence as to the cause of the accident.—*Olmstead v. Hastings Shingle Mfg. Co.*, Wash., 94 Pac. Rep. 474.

93.—Defective Appliances.—An employer is not required to furnish absolutely safe appliances, but only with reasonably safe ones.—*McDonald v. California Timber Co.*, Cal., 94 Pac. Rep. 376.

94.—Injury to Servant.—In an action by a station agent against a railroad company to recover for injuries received by snow and cinders thrown by a snow plow through the window of the station, evidence held sufficient to show negligence justifying recovery.—*Atchison, T. & S. F. Ry. Co. v. White*, Kan., 94 Pac. Rep. 265.

95.—Injury to Servant.—Evidence that defendant's foreman had ordered the removal of the boulder held admissible to show that the foreman had knowledge of the unsafe condition of a slope where plaintiff was working when injured.—*Stratton Cripple Creek Mining & Development Co. v. Ellison*, Colo., 94 Pac. Rep. 303.

96. Mortgages.—Assignment of Debt.—The transferee of a negotiable promissory note, payment of which is secured by a deed of trust, held not an incumbrancer to whom power of sale is given within Civ. Code, sec. 858, and therefore such transferee, though the assignment of the note to him has not been recorded, may, upon the maker's default, demand a sale of the trust property to satisfy the indebtedness.—*Stockwell v. Barnum*, Cal., 94 Pac. Rep. 400.

97.—Deed Absolute.—Under Mills' Ann. Code, sec. 261, oral evidence held admissible to show that a deed absolute on its face constituted a mortgage.—*Blackstock v. Robertson*, Colo., 94 Pac. Rep. 336.

98.—Sale by Trustee.—After a sale under a trust deed by the attorney of the trustee corporation, a letter written to the purchaser by such attorney regarding a repurchase of the

property by the former owner held not binding on the trustee.—*Stockwell v. Barnum*, Cal., 94 Pac. Rep. 400.

99. **Municipal Corporations—Change of Street Grade.**—Where plaintiff presented a claim to the city for damages to his property by changing the grade of a street, and accepted a sum allowed therefor, the presumption is that such amount was in full compensation, and the burden is on him to prove that both parties intended it only as part payment.—*City of Rawlins v. Jungquist*, Wyo., 94 Pac. Rep. 464.

100. **Damages for Change in Street Grade.**—In an action for damages to plaintiff's property by changing the grade of a street, where plaintiff had presented his claim to the city and a part of it was allowed and received by him, evidence examined, and held insufficient to sustain the finding of the trial court that the parties understood and intended the sum received by plaintiff to be only a part payment of his claim.—*City of Rawlins v. Jungquist*, Wyo., 94 Pac. Rep. 464.

101. **Obstructions in Street.**—A municipal corporation must keep its streets free from obstructions, and a traveler may presume that it has done so, and that he can pass over them without danger.—*Mickey v. City of Indianola*, Iowa, 114 N. W. Rep. 1072.

102. **Negligence—Contributory Negligence.**—Though the negligence of the one injured may have been the primary cause of the injury, yet recovery may be had if the consequences thereof might have been avoided by reasonable care by the other party.—*Pilmer v. Boise Traction Co.*, Idaho, 94 Pac. Rep. 432.

103. **Dangerous Premises.**—It is negligence to maintain a guy wire from a telephone post to the ground some 25 feet therefrom and within the line of travel between a street and railroad station grounds without anything to attract attention of one approaching the station in the dark.—*Grant v. Sunset Telephone & Telegraph Co.*, Cal., 94 Pac. Rep. 368.

104. **New Trial—Discretion of Trial Court.**—The trial judge has discretionary power to grant an extension of time within which to file a motion for a new trial, and his refusal to do so will not be disturbed in the absence of abuse.—*Nelson v. Carlson*, Wash., 94 Pac. Rep. 477.

105. **Misconduct of Jury.**—Consent of a party that the jury should retire and reconsider their verdict held not to prejudice his right to a new trial on the ground of the jury's misconduct.—*Dralle v. Town of Reedsburg*, Wis., 115 N. W. Rep. 819.

106. **Nuisance—Injunction.**—Where the continued operation of engines near plaintiff's property would further damage his house and furnishings and interfere with his enjoyment thereof, damages held not an adequate compensation, and plaintiff was entitled to an injunction.—*Melvin v. E. B. & A. L. Stone Co.*, Cal., 94 Pac. Rep. 390.

107. **Partition—Laches.**—Where a decree of divorce made no disposition of the community property, an action by the wife for partition held not barred by laches, though not brought for about 13 years.—*Graves v. Graves*, Wash., 94 Pac. Rep. 481.

108. **Right to Partition.**—The owners of some of the undivided interests held entitled to have their parts considered as one moiety, and to unite in an application for such parti-

tion.—*Bowlsby v. Gregory*, Iowa, 114 N. W. Rep. 1060.

109. **Payment—By Check.**—The giving of a bank check by a debtor is not, in the absence of agreement, payment, but the presumption is that it was accepted conditionally.—*First Nat. Bank v. McConnell*, Minn., 114 N. W. Rep. 1129.

110. **Pleading—Alternative Pleading.**—Where complaint alleges in the alternative two statements of fact, one of which constitutes a cause of action and the other not, they neutralize each other, and demurrer will lie.—*Anderson v. Minneapolis, St. P. & S. S. M. Ry. Co.*, Minn., 114 N. W. Rep. 1123.

111. **Clerical Errors.**—In pleading, held that the date "1901" was properly treated as a clerical error for "1891."—*State v. Quantic*, Mont., 94 Pac. Rep. 491.

112. **General Demurrer.**—Where a general demurrer is filed to a petition, if any paragraph states a cause of action, the demurrer should be overruled.—*Cockrell v. Schmidt*, Okl., 94 Pac. Rep. 521.

113. **Necessity.**—While a new cause of action may not be alleged in a supplemental complaint different or additional relief, which is consistent with the original cause of action stated, may be asked for therein.—*Melvin v. E. B. & A. L. Stone Co.*, Cal., 94 Pac. Rep. 389.

114. **Principal and Agent—Authority of Agent.**—An agent held to have no authority to borrow money for his principal.—*Schramm v. Liebenberg*, Colo., 94 Pac. Rep. 345.

115. **Prohibition—Remedy by Appeal.**—Prohibition does not lie to prevent the trial court from proceeding to try a case, though it erroneously refused a dismissal at plaintiff's instance; the remedy by appeal being adequate.—*State v. Superior Court of King County*, Wash., 94 Pac. Rep. 472.

116. **Public Lands—Town Sites.**—Where townsite commissioners, under Act Cong. March 1, 1901, c. 676, 31 Stat. 861, by a misconstruction of the law, schedule a lot to a party who was not entitled to the same, after title has passed to a private party, equity will inquire as to whether or not such title shall be held as trustee for the party really entitled to the same.—*Leak v. Joslin*, Okl., 94 Pac. Rep. 518.

117. **Quietting Title—Ante-Nuptial Agreements.**—A widow seeking relief against her executed and fully performed ante-nuptial agreement has the burden of proving defects in the agreement sufficient to defeat it.—*Nesmith v. Platt*, Iowa, 114 N. W. Rep. 1053.

118. **Railroads—Injury to Traveler at Crossing.**—In an action against a railroad company for injuries to a traveler at a crossing, evidence held sufficient to sustain a finding of defendant's negligence.—*Denver & R. G. R. Co. v. Mitchell*, Colo., 94 Pac. Rep. 289.

119. **Receivers—Compensation.**—A receiver of a bank held entitled to receive reasonable compensation only, to be fixed by the court and to be less than a certain amount.—*RJordan v. Horton*, Wyo., 94 Pac. Rep. 448.

120. **Sales—Performance of Contract.**—Failure of the seller of machinery to ship it at the time and in the manner required by the contract of sale held to release the buyer from his obligation to accept it.—*Fountain City Drill Co. v. Lindquist*, S. D., 114 N. W. Rep. 1092.

121. **States—Claims Against.**—Under Const. art. 4, sec. 18, and Act March 9, 1905 (Sess. Laws 1905, p. 366), the state board of examiners may disallow in whole or in part a claim of a state officer for clerk hire in his office.—*Bragaw v. Gooding*, Idaho, 94 Pac. Rep. 438.

122. **Statutes—Registration Acts.**—The registration acts (Laws 1905, p. 188, c. 100, as amended by Laws 1907, p. 321, c. 147) held not to control the opening or conducting of elections within Const. art. 5, sec. 25, subd. 15.—*People v. Earl*, Colo., 94 Pac. Rep. 294.

123. **Street Railroads—Care Required Toward Trespassers.**—A boy 14 years old, entering on a railroad right of way inclosed by fences, held a trespasser and required to keep a careful watch for approaching cars.—*Wade v. Detroit, Y., A. A. & J. Ry. Co.*, Mich., 115 N. W. Rep. 713.

124. **Injury to Alighting Passenger.**—In an action against a street railroad for injuries to a passenger while alighting, the questions whether she indicated her purpose to alight, whether reasonable time was given her so to do, or whether she waited until the car was starting and then stepped out, were properly left to the jury.—*Farrell v. Citizens' Light & Ry. Co.*, Iowa, 114 N. W. Rep. 1063.

125. **Injury to Person on Track.**—The right and duty of pedestrians and a street railway company at a street crossing are reciprocal.—*Pilmer v. Boise Traction Co.*, Idaho, 94 Pac. Rep. 432.

126. **Who Are Passengers.**—An employee of a street railroad company while riding on a car to his place of work is a passenger, if he so rides of his own volition, and pays his fare in coupons issued by the company as a part of his wages.—*Hebert v. Portland R. Co.*, Me., 69 Atl. Rep. 266.

127. **Subrogation—Right of Mortgagee.**—Under Civ. Code, secs. 2969, 2970, a creditor who pays the mortgage on property which he wishes to attach cannot be subrogated to the right of the mortgagee, but must sell under execution in the original action.—*Carstenbrook v. Wedderlen*, Cal., 94 Pac. Rep. 372.

128. **Taxation—Board of Equalization.**—The state board of equalization and assessment acts in a quasi judicial capacity, and its action is not subject to collateral attack except for fraud, or for the exercise of powers not conferred upon it.—*State v. State Board of Equalization and Assessment*, Neb., 115 N. W. Rep. 789.

129. **Tax Sale.**—A notice to eliminate the right of redemption in the owner of lands sold for taxes, held void, and the land owner had not lost his right to redeem.—*Minnesota Debiture Co. v. Harrington*, Minn., 115 N. W. Rep. 746.

130. **Tax Titles.**—The constitutional provision providing that all grants, etc., shall be in the name of the people of the state and signed by the Governor, etc., does not apply to the statute empowering tax collectors to grant to purchasers at public auction land bought by the state at sales for delinquent taxes.—*Phillips v. Cox*, Cal., 94 Pac. Rep. 377.

131. **Tenancy in Common—Care and Management of Property.**—Tenants in common are not entitled to compensation from each other for services rendered in the care and management of the common property in the absence

of special agreement or mutual understanding to that effect.—*Wolfe v. Childs*, Colo., 94 Pac. Rep. 292.

132. **Trial—Action to Recover Money.**—In an action to recover money which defendants conspired to induce plaintiff to pay, a letter written by one of defendants being admissible to explain his conduct, the other defendants should have requested that its consideration be limited to that purpose if he so desired.—*Aughey v. Windrem*, Iowa, 114 N. W. Rep. 1047.

133. **Reopening Case.**—The application to reopen the case for further evidence after the amendment of the complaint to conform same to the proofs must show that defendant was misled or prevented from introducing evidence to rebut that on which the amendment was based, and that, if the case is reopened, he will be able to present testimony tending to rebut such evidence.—*Hedstrom v. Union Trust Co.*, Ga., 60 S. E. Rep. 386.

134. **Vendor and Purchaser—Bond for Deed to Convey.**—A grantee in a bond for deed becomes, on his assignment of an interest in the bond to a third person, a trustee of such interest in favor of the third person, and on the conveyance of the legal title he holds the title for the benefit of the third person.—*Wolfe v. Childs*, Colo., 94 Pac. Rep. 292.

135. **Waters and Water Courses—Appropriation.**—A diversion of water not applied to some beneficial use does not constitute an appropriation.—*Town of Sterling v. Pawnee Ditch Extension Co.*, Colo., 94 Pac. Rep. 339.

136. **Use for Irrigation.**—In an action to enjoin diversion of water from a stream from which plaintiffs irrigate, a finding that plaintiffs' land had been irrigated from the stream for 25 years is immaterial, since plaintiffs are entitled to have it continue in its customary flow, subject to reasonable use by other riparian owners.—*Huffner v. Sawday*, Cal., 94 Pac. Rep. 424.

137. **Wills—Undue Influence.**—In a will contest, the burden of proving undue influence is on the party asserting it.—*Snodgrass v. Smith*, Colo., 94 Pac. Rep. 312.

138. **Witnesses—Competency.**—Under Pierce's Code, sec. 937 (Ballinger's Ann. Codes and St. sec. 5991), plaintiff in a suit to quiet title against defendant, claiming title to an undivided half as heir of his deceased mother, whom plaintiff married, he'd not competent to testify as to the marriage.—*Nelson v. Carlson*, Wash., 94 Pac. Rep. 477.

139. **Competency of Physician.**—Under Mills' Ann. St., sec. 4824, a physician not authorized to practice under the laws of the state held not forbidden to testify concerning information acquired in attending a patient.—*Colorado Springs & Interurban Ry. Co. v. Fogsong*, Colo., 94 Pac. Rep. 356.

140. **Impeachment.**—Where a witness testifies that the reputation of another witness for truth and veracity in the neighborhood where he resides is bad, he may be asked if he would believe such witness under oath.—*People v. Ryder*, Mich., 114 N. W. Rep. 1021.

141. **Writ of Error—Questions Reviewable.**—It is not necessary to assign the overruling of a motion for a new trial as error, unless it is desired to have reviewed all matters embraced therein without further assignment.—*Riordan v. Horton*, Wyo., 94 Pac. Rep. 448.

Central Law Journal.

ST. LOUIS, MO., AUGUST 7, 1908.

THE STANDARD OIL REBATE CASE.

No case recently decided has caused so much discussion throughout the country, as that under consideration. The impression which those in sympathy with the Standard Oil people have endeavored to make is, that the recent depression in business circles is directly attributable to Judge Landis' decision, whereby the Standard Oil Company was penalized something over \$29,000,000, and the only moving cause, which may be attributed, to account for the condemnation which many have indulged against Judge Landis' decision is, that it has caused a business depression. The consideration of the integrity of our laws has been for a long time secondary among those who control the prime factors of the nation's business affairs, and the same is true of many others dependent upon them. This fact is the most subtle and dangerous problem with which our statesmen have to deal to-day. Due process of law is government itself. When the power of wealth begins to conserve the functions of government, then is the time for the people to be rightly informed. The prosperity which may temporarily be bolstered up by the Court of Appeal's decision and the applause raised in money centers, controlled by the parties most interested in the outcome of the suit in question, may deceive many people now, but there will come a time of awakening if the people do not heed the warnings:

"There is the moral of all human tales,
 'Tis but the same rehearsal of the past,
 First Freedom and then glory—when that fails,
 Wealth, vice, corruption—barbarism at last,
 And history with all her volumes vast hath but
 one page."

We repeat, let not the people be deceived by the applause which has gone forth be-

cause of the reversal of Judge Landis' opinion. 'Tis but the "Weaving of the spider's web." The "hatching of the cockatrice's eggs." Its success, if continued, will be "but the rehearsal of the past" and "that which is crushed will break out into a viper."

We were, and are still, of the opinion that Judge Landis' decision was based upon the truths which have stood as the best bulwarks of the nations of all ages. It is ridiculous to say that this was but the first offense. A good judge does not "look through a glass darkly." He can not be good unless he sees things as they truly are. Judge Landis looked and saw old offenders back of the Indiana corporation—offenders against the welfare of the nation and brought them face to face with their crime. It was a case where the law must be administered so as to be effective. It was his duty to so construe that law as to make it effective. *Lex non exacte definit sed arbitrio boni viri permittit*, is a maxim which lies at the base of government. "The law does not exactly define, but trusts in the judgment of a good, (wise) man."

In putting into effect "due process of law," construction is above and over everything. What is the use of a law unless it can be so construed as to meet the emergency which gave rise to it? As between Judge Grosscup and Judge Landis, whose construction of the law makes it effective?

Can there be any possible doubt but that the requirement in Judge Landis' opinion does anything more than conserve the best interests of government, by giving effect to a principle which lies at its very base? What good would the law be if its requirement only held a shipper to account, who knew the rate at the time of the shipment? The shipper would make it his business not to know it, when convenient. It has been the experience of ages that the best interests of government demand that every man is presumed to know the law? Judge Landis' opinion sustains this fundamental principle.

If Judge Grosscup's opinion is to stand as the law, then one of the great props of government is more than menaced, for this great principle of construction is a part of our unwritten constitution, an inheritance of the wisdom of the ages, a part of England's unwritten constitution and most sacredly preserved by her judiciary.

The fact is, that this principle is so woven into the fabric of our government that the very menace of it should be a sufficient ground upon which to claim the jurisdiction of the United States Supreme Court. It is but a matter of construction whether the Supreme Court should regard it of such vital importance as to extend its jurisdiction to cover it.

We firmly believe that had the question arisen in John Marshall's time, he would not have hesitated to have sustained the right of the Supreme Court to have considered it so much a part of the constitution as to be equal to anything written in the constitution. He was a firm believer in the idea that there are certain great principles which are so much a part of the constitution, that they must be read into it, as a matter of proper construction and our present federal supreme court has sustained this view frequently.

What would government be without it? This is a question of serious moment. It is of the very cement which holds the stones of the structure of the constitution in place. Take it out of the provision for due process of law and you might as well take out the whole provision for due process of law.

Ignorantia legis neminem excusat. (Ignorance of the law excuses no one.) Upon its application depends the operation of government. Without its support there would only remain the voluntary recognition of justice and performance therefore. Hughes' Grounds & Rudiments of Law, 547.

The logic of Judge Benjamin's opinion which will appear as an editorial in our next issue, and which we desire to have read herewith, is that even though Judge

Landis investigated the New Jersey Standard Oil Company's financial standing and ability to pay the fine, still he had the right, regardless of this investigation, to enter up the fine imposed. But leaving out of consideration that part of Judge Landis' opinion relating to the New Jersey corporation, which the Court of Appeals condemns, if ever there was an opinion which should be taken up on a writ of certiorari to the Supreme Court, this is that one, for it is utterly impossible to escape that gross error would imbue any opinion following that of Judge Grosscup, such as we have pointed out.

NOTES OF IMPORTANT DECISIONS

STATUTE OF FRAUDS—SUFFICIENCY OF WRITING—CONTENTS OF MEMORANDUM AND DESCRIPTION OF LAND.—In *Cunha v. Gallery* (R. I.), 69 Atl. Rep. 1001, the question of the sufficiency of a memorandum in writing to take a prosecution out of statute of frauds is dismissed. In this case the defendant gave the plaintiff a memorandum in writing, as follows: "I have sold this place to Manuel J. Cunha for \$2,100 cash, and is all clear of mortgage. Signed, Catherine M. Gallery." Defendant also gave plaintiff a deed, which contained the description of the property so agreed to be conveyed.

Questions of law were certified up to the supreme court as follows:

"(1) Was the memorandum in writing above referred to a sufficient memorandum to satisfy the statute of frauds? (2) Did the deed alleged to have been delivered to the plaintiff by the defendant, as above referred to, constitute a part of the memorandum in writing? (3) Was the above memorandum, together with the deed above referred to, a sufficient memorandum in writing to satisfy the statute of frauds?"

The court then proceeds to answer these queries as follows:

In *Ray v. Card*, 21 R. I. 362, 43 Atl. Rep. 846, the words of description were "that lot," and the description was held to be insufficient to answer the requirements of the statute; the court holding that, "while resort may be had to parol evidence to fit the description to the land, such evidence is inadmissible where there is no description." We are of the opinion that the case at bar is ruled by this decision, and accordingly we answer the first question in the negative.

Chancellor Kent, in his observations on the requirements of the statute, says (2 Kent, Comm. *511): "Unless the essential terms of the sale can be ascertained from the writing itself, or by a reference contained in it to something else, the writing is not a compliance with the statute; and if the agreement be thus defective, it cannot be supplied by parol proof, for that would at once introduce all the mischiefs which the statute of frauds and perjuries was intended to prevent." The memorandum in question contains no reference to any other document, and we are clearly of the opinion that it is not competent to consider the deed alleged to have been delivered as a part of the memorandum required by the statute. It necessarily follows that the second and third questions must also be answered in the negative.

The papers in the cause may be sent back to the district court of the Eighth judicial district, with the decision of this court upon the questions submitted certified thereon.

In line with the principal notes, see *Mentz v. Newwitter*, 122 N. Y. 491, 25 N. E. Rep. 1044, where it is held that the memorandum of a contract for the sale of land must show without aid of parol proof, the essentials of the agreement, including the subject matter of the sale, the terms, and the names or descriptions of the parties also.

CRIMINAL LAW—CORPUS DELICTI—EVIDENCE OF—CONFESSION OF ACCUSED.—In *People v. Ranney* (Mich.), 116 N. W. Rep. 999, occurs a very able discussion of a subject of proof of corpus delicti by the confession of an accused person. The defendant procured funds on a check drawn on a New York bank, which check was forwarded through the usual channels and returned unpaid. It was contended on the part of the defendant that there was not sufficient proof of the commission of the offense. He had made a confession, and the proposition was advanced that the commission of the felony cannot be proven by the extra judicial confession of the accused. In other words, that his guilt could not be determined by his confession that the check was worthless, and was by him known to be worthless; that the people were bound to show presentation of the check to the bank on which drawn, if such an institution existed; that it was not drawn against funds; that payment was refused.

As supporting the general rule that the corpus delicti may not be proved by the naked extra judicial confession of the accused, the following authorities are cited: 12 Cyc. 483; 6 Am. and Eng. Ency. 582;

Wharton Criminal Evidence (eighth edition), Pars. 632, 633; *People v. Lane*, 49 Mich. 340, 13 N. W. Rep. 632.

The court then discusses the question as follows: "The question presented leads to the inquiry: What is the corpus delicti in a case like this one? Mr. Wigmore (vol. 3, par. 2072) says that an analysis of every crime with reference to this element of it, reveals three component parts; first, the occurrence of the specific kind of injury or loss (as in homicide, a person deceased; in arson, a house burnt; in larceny, property missing); secondly, somebody's criminality as the source of the loss—these two together involving the commission of a crime by somebody—and, thirdly, the accused's identity as the doer of this crime; that the term corpus delicti seems in its orthodox and its logical sense to signify merely the first of these elements, namely, the facts of the specific loss or injury sustained, although some judges (Chief Justice Shaw in *Commonwealth v. Webster*, 5 Cush. (Mass.) 295, 52 Am. Dec. 711, and Chief Justice Church in *People v. Bennett*, 49 N. Y. 137, among others) have held that it also includes the second element. I do not find any general rule laid down by the decisions of this court. Language is employed in *People v. Hall*, 48 Mich. 482, 485, 12 N. W. Rep. 665, 42 Am. Rep. 477, which indicates that in cases of homicide the corpus delicti involves the death and, also, its character, whether probably caused by some one other than the deceased. See, also, *People v. Aikin*, 66 Mich. 460, 472, 474, 33 N. W. Rep. 821, 11 Am. St. Rep. 512; *People v. Parmelee*, 112 Mich. 291, 294, 295, 70 N. W. Rep. 577. The rule that the corpus delicti must be proved by some evidence other than the confession of the accused—that the confession must be corroborated—is recognized in *People v. Lambert*, 5 Mich. 349, 366, 72 Am. Dec. 49; *People v. Isham*, 109 Mich. 72, 67 N. W. Rep. 819; *People v. Hawksley*, 82 Mich. 71, 73, 74, 45 N. W. Rep. 1123; *People v. Kemp*, 76 Mich. 410, 416, 43 N. W. Rep. 438, and *People v. Hess*, 85 Mich. 128, 132, 48 N. W. Rep. 181, but without determining, in either case, except perhaps inferentially, what constituted the corpus delicti. In some cases the idea has been expressed that the nature of the offense charged was such that no proof of the corpus delicti could be made as of a separate element of the offense. Such are the cases of *People v. Swetland*, 77 Mich. 53, 63, 43 N. W. Rep. 779, and *People v. McGarry*, 136 Mich. 316, 324, 99 N. W. Rep. 147. In *People v. Swetland* it was said: 'There are some cases where the corpus delicti—generally in homicide—is clearly separated and distinct from

the question as to who committed the offense, if any is found to have been committed. In such cases the evidence to establish the *corpus delicti* must first be given, before acts or admissions of the accused can be put in evidence. But the present case is one where the body of the offense—the uttering of a forged instrument, knowing it to be false—is so intimately connected with the question whether or not the respondent is guilty of the crime that there can be no such separation. The *corpus delicti* in this case depends entirely for its existence upon the acts and intent of the respondent, so that her acts and admissions, if admissible at all, were admissible at any stage of the proceedings upon the trial."

It is held that the confession should be corroborated as to the *corpus delicti*. As to this the court says:

"There is evidence undisputed—indeed, corroborated by respondent—that he applied to Mr. Rice, the keeper of the hotel, to cash the check, that the check was cashed, and respondent received the money. The check was forwarded in the usual course of business to New York, and was returned unpaid. It has not been paid, and Mr. Rice has never received his money. Before the check was cashed, and as an inducement, respondent, who was at the hotel with a woman not his wife, and owed the proprietor for entertainment, stated that they were going to Muskegon for three or four days, and would then return to the hotel, and that meantime Mr. Rice could find out whether or not the check was good; that he would leave a big trunk and a typewriter in it. He left the trunk, but no typewriter."

DIVORCE—CONDITIONAL DIVORCE—FINAL DECREE AFTER ONE YEAR.—A recent decision construing an Illinois statute, but of more than usual interest, was handed down by Judge Ball of the superior court of Cook county, Chicago, Ill., on May 5th, 1908, reported in 40 Chicago Legal News, 320, the case being that of *Richard O. Kruger v. Pearl L. Kruger*.

The petition is in equity, and alleges that the defendant procured a divorce from Richard O. Kruger, and that by the terms of the decree he was ordered to pay \$60 alimony monthly during the lifetime of the two, with the provision that in case she should remarry the payments would cease. The divorce was granted on July 3d, 1907, in the same court, but the petition alleges that on March 11th, 1908, she was married in Indiana.

The section of the statute under which the divorce was granted contains a provision that neither parties shall marry again (unless to

each other) within one year from the date of the decree, and that any person marrying contrary to such provisions "shall be punished by imprisonment in the penitentiary for not less than one year, nor more than three years and said marriage shall be held absolutely void." The provisions of the statute were set up by the wife in her answer, and the wife also alleged that on her return to Illinois she was informed that the Indiana marriage was void, and that she thereupon filed suit to annul the same. She also set up a like violation of the statute by the petitioner.

The court sustains the validity of the act of the legislature, citing *Olson v. State*, 219 Ill. 40. The court says that if the marriage of Pearl L. Kruger to Boud is valid the petitioner should be discharged from the further payment of alimony coming due after March, 1908. But if such marriage is void, he is still bound for his payment. The court then says:

"In interpreting a decree of divorce the statute relating to divorces is a part of and must be read into it. So doing, it is evident that the divorce is not absolute. It incapacitates the parties thereto from remarrying (except to each other) for the period of one year from the date of the decree. A violation of this provision is a violation of the decree, for which the offending party could be brought before the court granting the decree and punished, as for a contempt of court. In such case the offender could not successfully reply by setting up that the violation occurred in a foreign state, to which he or she had gone for the purpose of avoiding the effect of the decree. The law will not suffer its commands to be thus nullified. The decree is disobeyed whether the forbidden marriage occurred with in or without this state. The general rule is that a marriage valid where entered into is valid everywhere. This rule is recognized under the law of comity; and it will be enforced in a foreign jurisdiction, unless it is prohibited by the laws or by the public policy of that jurisdiction. The public policy of a state is found in its constitution or in its statutes. If the constitution be silent upon the subject, and the legislature has spoken, the public policy of the state is what the statute indicates. *Ins. Co. v. Yates*, 214 Ill. 277."

There are comparatively few, if any, other jurisdictions where divorces of this character are provided by statute. While the court does not expound the meaning of the provision, it would seem that a divorce granted under the provisions of the act in question is not a divorce within the usual meaning of that term until the expiration of the year pro-

vided for. At the end of the year the order of court, which has been in but partial effect, becomes vitalized and effective and the divorce is absolute.

As to the effect in another state of the marriage, the court has this to say:

"It is assumed that the second marriage was valid in the state where it was performed. Had the parties to it left this state, and so long as they remained aliens as to this state the marriage would continue to be valid. But while they remain citizens of this state they are governed by its laws. This view is sustained by the highest courts of England: (*Brook v. Brook*, 9 House of Lords Cases 212; *Sussex Peerage Case*, 11 Clark & Fin. 85), by well considered decisions in several of our sister states (*Pennegar v. State*, 87 Tenn. 244; *Williams v. Oates*, 27 N. C. 535; *Estate of Stull*, 183 Penn. 625), and by our best text writers. Story on Conflict of Laws, secs. 86, 87; Wharton on Conflict of Laws, secs. 159, 165b."

WHAT LIABILITY DOES A BANK ASSUME AS TO THE QUALITY AND QUANTITY OF THE GOODS DESCRIBED IN A BILL OF LADING INDORSED BY IT?

I have been asked to discuss the question: "What liability does a bank assume as to the quality and quantity of the goods described in a bill of lading indorsed by it?" and have consented to do so.

A bill or lading may be defined as a written acknowledgment by a carrier of the receipt of certain goods, and an agreement for a consideration, to transport the same to a specified place, and there deliver them to the person designated, or to his order.

They have been in use from time immemorial, and are indispensable to commerce as a symbol of ownership of the property they represent. They are negotiable in the sense that they possess the quality of transferability; but not negotiable in the sense that a bill of exchange is, for the latter is truly said to be: "A 'courier without luggage' whose countenance is its passport;" while a bill of lading is at most but a symbol of ownership of a thing not seen.

The object sought by legislative enact-

ment declaring them negotiable was doubtless intended to authorize a transfer of title by indorsement and delivery, thereby enabling the assignee of such a bill to do what he could not do at common law—maintain an action in his own name, and these things constitute negotiability.

The law should encourage, and does encourage the use of bills of lading as a safe and convenient medium of transferring the title to property in transit. The liability attending such a transfer is the question before us.

At the outset, I may say that the degree of liability a bank assumes as an indorser of a bill of lading depends upon the circumstances under which, and the manner in which, such a bill is indorsed. I think I may lay it down as a rule without exception that the owner of a bill of lading, whether he is the consignor or one subsequent in the line of ownership, who indorses it without restriction as an original instrument of sale and transfer, thereby warrants its validity, his ownership thereof and that the quality and quantity of goods therein mentioned are described with reasonable accuracy.

This liability does not attach by reason of the arbitrary rules of the law merchant applicable to bills of exchange, for that instrument is intended to, and does circulate as money, and of course all persons who pass it by indorsement receive value for it, and vouch for it in all its parts; but upon the other ground, that he who puts an instrument in circulation which may be negotiated, and he who passes it on to others, do, by their indorsements, warrant it genuine and descriptive of what it purports to represent. Put in another form, the liability emanates from the doctrine of implied warranty, holding that he who sells and delivers an article, commodity or thing impliedly warrants it to be of the kind and character represented, and also to contain the quantity sold, as well as the fact that he is the owner.

Any other rule would discredit an in-

strument which, in the commercial world, is only second in importance to the bill of exchange and promissory note.

If, therefore, a bank becomes the purchaser of a bill of lading and, having acquired the same, sees fit to make unrestricted indorsements on it; then it is liable for the quantity and quality of the goods described therein, and the measure of liability in such a case would seem to be the difference between the actual value of the goods received by the consignee and the value of the goods, had they been as warranted, but not to exceed in any case the value as agreed upon in the original contract.

But in the usual and ordinary transaction of commercial business, banks rarely ever purchase bills of lading outright. Indeed, to do so, the bank possessing only ordinary charter privileges might infringe upon the doctrine of *ultra vires*; but there are many difficulties attending the raising of that question, and the limitation in that regard would often go unchallenged.

The purchase of bills of lading by banks is so infrequent that I deem it unnecessary to say more as to that feature, and shall pass to another phase of the case in which the bill of lading performs a more useful service. I refer to the practice so prevalent among banks of accepting these bills as collateral security. This purpose is accomplished in a variety of forms. The bill is sometimes taken out in the name of the bank by the consignor, and in that form deposited as collateral. It is sometimes assigned by the consignor in blank; or to bearer, for the same purpose, but more commonly taken out by the consignor in his own name, and assigned directly to the bank. In any case, it is accepted by the bank as collateral security for the payment of the instrument discounted—usually a note or bill of exchange. By such assignment, the bank becomes possessed of the right to collect the price of the goods represented by the bill of lading from the purchaser or consignee, upon surrender to

him of the bill of lading. This, of course, requires an assignment by the bank to make a connected chain of title which the carrier, to whom it is finally surrendered upon delivery of the goods, has a right to demand.

An assignment under these circumstances is an incident to the payment of the note or acceptance of the draft, and no liability attaches to the bank by making it; for the bank in either case, it is clearly seen, is merely the channel through which the purchase price of the goods represented by the bill of lading is collected. If, upon examination by the consignee, it is found that the goods are not of the quality purchased, or that quantity is lacking, the bank cannot be held, for the reason that it is not a party to the sale; and the vendor alone, with whom the principal transaction was had, must be looked to for damages on account of deficient quantity or inferior quality.

The reasons for such a rule are numerous, but not least among them is that the bank is not a party to the sale, and knows nothing of, nor is it interested in, the equities between the original parties to the sale. Again, its relation to the whole transaction is covered by an instrument of the law merchant, either the promissory note or the bill of exchange. The payment of the one, or the unconditional acceptance of the other by the consignee furnishes conclusive evidence that the maker of the note or the drawer of the bill was authorized to demand of and receive from the consignee the purchase price of the goods.

While a few courts of last resort have held that a bank by indorsing a bill of lading deposited with it as collateral security is liable for the quality and quantity of goods described in it, the great weight of current authority, both in England and the United States, is to the contrary effect. Any other rule than the one adhered to by the majority of the courts would, under present business customs, cause a wide disturbance in commercial affairs.

J. T. WOODRUFF.

Springfield, Mo.

CORPORATIONS — SUBSCRIPTION TO
STOCK — MISREPRESENTATIONS —
REPRESENTATIONS OF FACT.

MARTIN v. VEANA FOOD CO., LIMITED.

Supreme Court of Michigan, June 27, 1908.

Representations that there was a constantly increasing demand for the product of a corporation, that it had a plant costing a specified sum, that the experimental stage had passed and the basis for assured success had been laid, that the plant had an output of a designated quantity of goods, which would give a net profit of a specified per cent. on the investment, are not mere expressions of opinion, and when made to one to induce a purchase of corporate stock do not relate to immaterial matters.

One may not by actual misstatement, without liability therefor, induce the belief that a business venture is without other risk than the usual risk of an established and prosperous business, though one may without legal liability permit another for a consideration to share his hopes.

A corporation manufacturing food induced one to purchase stock and to contract to act as district manager at an annual salary and a commission on the business done except the first 300 cases of goods per month. The representations made by the corporation and its officers were false. In the experience of the corporation no manager had been able to sell 300 cases per month. Held, that in an action for fraud because of the misrepresentations, it was competent to show that it was impossible or unlikely that a district manager could perform his contract to sell 300 cases of goods each month.

OSTRANDER, J.: Plaintiff, on September 30, 1904, purchased from defendant association, at par, and paid for \$1,000 of its capital stock. Later, in December of the same year, he asked the association to take his stock and repay him his money. This it did not do. His action is for damages for fraud and deceit. At the trial, plaintiff having closed his case, the court directed a verdict for defendants, and judgment was entered on the verdict. The errors assigned make it necessary to determine whether upon that view of the testimony, admitted or wrongly rejected, most favorable to plaintiff, there were questions which should have been submitted to the jury. The defendant association was organized March 10, 1902, with a capital of \$500,000, in shares of \$1 each. Ten thousand dollars in cash was paid in by ten men, each of whom received \$25,000 of stock. Of the \$350,000 of stock represented as paid, the remainder was first given, or paid, for a formula for making flaked goods. Of this, 68,000 shares, and perhaps a greater number, were afterwards turned into the treasury. Various persons purchased stock at from 10 to 25 cents a share to the amount of \$9,925.

A factory was built at an expense of \$47,000, money for this purpose being borrowed as was necessary. Manufacture of food was begun in May or June, 1903. On September 1, 1904, the association was overdrawn at the bank \$10,820.71, and had a total indebtedness apparently of more than \$34,000. Sales of stock were made at par to persons appointed district managers, to the amount of \$51,325. Plaintiff's connection with the association is best shown, though at the expense of considerable space, by the following recital and by documents, copies of which are given. He was employed at Aurora, Ill., when he read in the Scientific American, in its issue of September 3, 1904, the following advertisement: "Reliable man wanted. A prominent cereal food company will contract with thoroughly reliable man for two years at \$150 a month, together with commission and office expenses. Highest references required. Address, 'Auditor, Box 475, Bellevue, Mich.'" Plaintiff wrote to the address and in reply received a letter from defendant company, inclosing a prospectus. The following is the letter:

"J. R. Hall, Chairman. F. M. Mulvaney, Treasurer. T. E. Robinson, Secretary and General Manager. The Veana Food Co., Ltd. Manufacturers of Veana Flaked Cereal Food. Bellevue, Mich., Sept. 13, 1904. L. H. Martin, Aurora, Ill. Dear Sir: Your valued favor of recent date in reply to our advertisement has been received and filed; replying to same, we will endeavor to give you a brief, yet intelligent, idea of the situation, and then if interested we will take the matter up with you in detail. We are engaged in the manufacture of 'Veana Flakes'—undoubtedly the acme of perfection in the cereal food line. There is a constantly increasing demand for our product, and in order to afford better facilities for the handling of our goods we have decided to open several branch offices or distributing depots, and are now in search of competent men to take charge of same. We have recently adopted the co-operative system of doing business, and believe that our best employees, who hold responsible positions with us, should participate in the profits they help to make. Our company is incorporated under the laws of the state of Michigan with an authorized capital of \$500,000. At a recent meeting of the board it was decided to set aside \$100,000 worth of stock, which is to be offered until Jan. 1, 1905, to our branch office managers in blocks of from 1,000 to 5,000 at par one dollar per share, which must be paid for in cash at the time of closing contract; we do this for the reason that our experience and that of other

well-known concerns has proven beyond doubt that when a man has a financial interest in the company he represents, he puts forth a much better effort than were he merely an employe. Therefore, in order to secure the best possible results from our branch managers, we deem it imperative that our trusted employes be financially interested with us. Our proposition is not made through philanthropic motives, but is based upon purely business principles, and we court from those who are in a position to meet the requirements the closest investigation.

"To put the entire proposition to you in a nutshell, we want as branch office managers men of ability to interest themselves with us financially, morally and commercially, with a view of producing by concentrated effort the best results possible. The minimum investment that can be made by our branch office managers with us is \$1,000, and the maximum \$5,000, and with men of whom we approve we are prepared to close a two years' contract at a salary of \$1,800 per annum, payable monthly, and ten per cent commission on the business done through his territory, except the first 300 cases per month, also fifty cents per case on all goods sold by his individual efforts, so that a hustler ought easily to make \$5,000 per year. In addition he will receive the dividends accruing to his stock, which is fully paid and non-assessable. We will rent and furnish at our own expense office quarters and warehouse facilities. We are thoroughly established, have a plant which stands alone in its class, both from architectural and mechanical engineering standpoints, which has cost about \$100,000, will produce daily 600 cases of better food at a lower price, and consequently at a higher profit, than any factory yet built. Our entire proposition is co-operative, it being, as we have stated before, our firm belief that concentrated effort will bring results obtainable in no other way. The duties of a manager will be to secure, employ and superintend a force of local and traveling salesmen to cover the territory which we assign him; in short, he is to have general control and supervision over the business of his department, and to handle the same as though it were his own. If a man has managerial ability and will follow our instructions he can readily adapt himself to our business. The credits and collections will all be handled from the home office, so that a man can give his undivided attention to the sale of our goods.

"If you are interested from what we have told you of our proposition, you can secure from either Dun or Bradstreet our rating, also the very best banking references and

other evidence of our standing, and we shall expect equally as good references from the man who wishes to take up and expects to fill so important a position as that of branch office manager of this company. If you feel that you are in a position to meet with all the requirements as outlined, and would like to go into the matter in full detail, write us—but do not simply ask for details—make your questions specific and right to the point. We shall also be pleased to hear from you at an early date, giving us your references and a brief statement relative to your experience, in order that we may ascertain if you are the man we are looking for. Hoping that we may be favored with a prompt reply, we beg to remain, yours respectfully, The Veana Food Co., Limited. T. E. Robinson."

The prospectus: "The Veana Food Company, Limited, Capital Stock, \$500,000. Bellevue, Michigan. Officers: Chairman, J. R. Hall; Treasurer, F. M. Mulvaney; Secretary and General Manager, T. E. Robinson. Prospectus: The Veana Food Company, Limited, having profited by the experience of all other large food plants, has to-day the finest and best equipped food plant in Michigan, if not in the world; not the largest or most elaborate, but the most complete; in fact, a perfect plant. While most of the food companies handle their product in a very rude and expensive manner, the Veana Food Company will not lay a hand on its product from the time it enters the hoppers until it comes out in cartons. Nothing has been left out and no modern idea overlooked. Unless one has given thought and attention to the cereal food business, the rapid growth and fortunes that have been made in it read more like some tale of enchantment from Arabian Nights. A volume could be written on the subject, but we cite only two instances: One manufacturer began seven years ago in a barn in Battle Creek, with scarcely a dollar of capital—in fact, had to borrow money for the purpose, and his advertising was done on credit; now he is a multi-millionaire, and the sales of his factory in 1902 were over \$4,000,000, after spending \$600,000 in advertising. Two years ago the stock of another company went begging at 17 cents on the dollar—it is now worth twelve and one-half times par value, and the company is incorporated for several millions. It might be well to state right here that the remarkable growth of Battle Creek during the past two years is directly attributed to these two food companies—over two thousand houses having been built in a single year. After careful investigation of the co-operative system now in use by the Carnegie Steel Co., the

National Cash Register Co., Proctor & Gamble, Sir Thomas Lipton (the world's greatest tea merchant), et al., it has been found that the phenomenal success of these well-known concerns was attributed largely to co-operation, and clearly demonstrated the merit of the system. Therefore, on June 1, 1903, the Veana Food Co., Ltd., decided to adopt the co-operative system, and there can be no question but that by giving their branch office managers an active and financial interest in the business it will undoubtedly distance all competitors in a very short time, and secure results not obtainable by any other means. Not only is it gathering about itself a small army of gallant workers who stand shoulder to shoulder, all working together for the good of the whole, but it has made it possible for them quickly and radically to better their own fortunes. Should any one of our branch office managers start in business for himself with a capital of \$1,000 or even \$5,000 he would cut little figure in these days of competition—we do not care what line he selected, nor in what town he located; but by joining hands with us he not only has the advantage of many thousand dollars, but of the full-fledged factory besides. The food situation of to-day is past the speculative stage, it having proven itself the best investment of the day. The truth of the statement can be easily verified by consulting the mercantile agencies in regard to food investments during the past three years. In order to appreciate the value of our earning capacity it should be remembered that we have an output of over 1,000 pounds an hour of chemically pure food, which will show a net profit of thirty-five per cent on the investment. The success of this company is not a matter of speculation, for two very important reasons: First, this is a cereal food age in which the public with increasing discrimination demands cereal foods, selects and continues to use that which is best, and to make rich the men who manufacture and market it. Second, the men at the head of this company thoroughly understand this business in every detail; having demonstrated that it can and does produce an article of superior merit. In fact, the experimental stage has long since been passed and the basis of assured success well laid. In addition to our food plant we have installed a 3,000-light generator for the purpose of furnishing light and power for Bellevue, the company having already secured a five-year contract and thirty-year franchise. The electric light plant will be operated without any additional cost of labor, as the same engineer corps will run both plants. This is of tremendous import to the average stockholder

or prospective investor in the Veana Food Co. The lighting plant will not only increase the company's revenues, but will vastly help to make it independent. It is the purpose of this company to establish one branch office in each state in the Union for the sale and distributing of Veana Flake Food; placing in charge of same men of sterling integrity and business ability. We are in need of good, reliable men, and those who can properly qualify need never look further for employment."

Plaintiff visited Bellevue, went over the plant of the company, and, as has been stated, he purchased 1,000 shares of stock, and entered into the contract indicated by the correspondence. The testimony tends to prove that defendant Robinson said the business was in a prosperous condition; that some of the agents were very successful, and others not as successful; that there had been invested in the business from \$100,000 to \$125,000; that the business was successful and was paying about 30 per cent. Nothing was said about the indebtedness of the company, and no inquiry made concerning it. The testimony further tends to prove that whatever hopes may have been entertained by the promoters of this association, it was not, when plaintiff purchased his stock, conducting a successful business, was not prosperous, was not solvent. The product it manufactured was without any considerable reputation in a market where competition was swift and sharp, and except that it was an organized concern with a plant for manufacturing a flaked food, and had to some extent, by advertising and in other ways, exploited its business, it had nothing to offer to any purchaser of its stock except a place in an adventure, the history of which was not, especially in the absence of large sums available for advertising, prophetic of final success. It did, in fact, fail of success.

It must have been expected that plaintiff would rely upon the representations, first, that there was a constantly increasing demand for the product; second, that there was a plant which had cost about \$100,000; third, that the experimental stage had long since been passed and the basis of assured success well laid; fourth, that "In order to appreciate the value of our earning capacity it should be remembered that we have an output of over 1,000 pounds an hour of chemically pure food, which will show a net profit of thirty-five per cent on the investment." These are not mere expressions of opinion and do not relate to immaterial matters. When these printed representations were followed by the express oral statements of officers of the company to the effect already stated, it cannot be said

that the plaintiff and the defendants were dealing on even terms, that deceit, with or without malice, was not practiced to the injury of plaintiff.

The testimony of the secretary and general manager is: "We felt the need of money at that time. We were like most anybody, we need money all the time. April 30, 1903, at the time of this meeting (when the plan was authorized) was before we began to manufacture our product. That was just when we were finishing our mill. We found ourselves in need of money and an output of our product." At different times some fifty agents or district managers were appointed after purchasing stock. Some of them had contracts requiring them to sell no more than 200 cases each month, and it appears that failure to sell this amount did not in every case deprive the manager of his salary. The same witness further testified concerning his interview with plaintiff, which, as we have seen was in 1904: "And I told him we had a good plant, we had a good food; that we were working most of the time; that some of our managers were good, and some were not so good; that we did not want any dead ones; that we wanted live ones, and for the man that was a live one we had a good proposition; and told him that the territory in order to make the office pay expenses in good shape should furnish 300 cases a month, and I told him that he or anyone else that didn't think they could sell that, that we didn't want them; that we had had some that had fallen down and weren't any good; and I marked out to him on a paper there how he could—what the sale of 300 cases would mean, \$150 a month, and his commission would start on over and above the 300 cases and 50 cents per case on his own individual efforts. That was about the limit of the conversation that I had with him. Mr. Hall was there, and he was in his company a good share of the time after that."

Coupled with the statement that the business was prosperous, this was a direct representation that a good manager ought to secure sales of 300 cases per month and more. It was both an inducement to buy stock and a representation of its value. Undoubtedly, one manager of the sales of goods will excel another manager in the same territory, but at this time (1904) the defendant company and its officers had had an experience of more than a year in the sale of their product and had employed various managers in various states. The same witness testified: "The first year we were at it we did very little; we went at it in a very mild way, and then the next year the market was flooded with so many

kinds of foods and the quality was such that complaints came in from our customers and the like of that that the stuff was not moving, and I should say that was in 1904, some time, the summer and fall perhaps. Very soon after we started we found there was competition, and very strong. We finally found it became very fierce. The competition was quite strong. The demand fell off some and shortened up in the winter months of 1903 and 1904, and then again in the fall of 1904 and 1905. It wasn't pleasant, lots of it. We were selling some, but not a great deal. We figured out a profit in the goods, provided we could sell them."

Plaintiff was not given an opportunity to try to sell the goods before investing in the stock. If, therefore, in the experience of the company no manager had ever been able to sell 300 cases of the food per month, the offer made to plaintiff to sell him the stock at par upon such conditions, coupled with the statements of the general manager, and the representations of the prospectus, was a misrepresentation. The argument that defendants had the right to enter into such contracts with agents as it, and they, pleased, that if plaintiff and other managers had performed their contracts the salaries could have been paid and the stock would have been valuable, that in the absence of actual bad faith defendants should be held innocent, is not convincing. There is testimony tending strongly to prove the honest belief of defendants in the ultimate success of the enterprise. Undoubtedly one may, without legal liability for results, permit another, for a consideration, to share his hopes, however adroitly the statement of his hopes may be phrased. He may not by actual misstatement and without liability induce the belief that the venture is without other risk than the usual risk of an established and prosperous business. The claim of plaintiff is that defendants represented as actual that which they hoped might become actual; that he paid his money, relying upon the representations. We are of opinion that it cannot be said, as a matter of law, that plaintiff is entitled to no relief.

What has been said disposes of most of the alleged errors. Under the circumstances plaintiff should be permitted to show, if he can, that it was impossible or unlikely that a manager could perform his contract to sell 300 cases of the food each month. Other questions presented are not likely to arise upon a new trial.

The judgment is reversed, and a new trial granted.

Note.—Misrepresentation in Sale of Stock as Ground for Rescission and Recovery of Money Paid.—There are many intricate questions growing out of the promotion and organization of corporations, and the flotation of their securities. The proposition involved in the principal case has been frequently before the courts, and it seems to be the established rule that corporations are no more free to make such misrepresentations than are individuals. It is settled beyond question that promoters of a corporation are liable for their misrepresentations, and it would appear that on principle where the misrepresentation has been made on behalf of the corporation, and the corporation has reaped the benefit of the fraud, that it should be liable at the suit of a purchaser.

Corporations have in recent years grown in favor as an instrumentality for the conduct of business, and while the great majority are doubtless organized and conducted along safe and conservative lines, the management sometimes falls into the hands of persons who do not so conduct the business.

One man or set of men can no more swindle and cheat another out of his money in order to make a corporation, and set it to work, than he or they could cheat and swindle him into any other contract, or about any other thing. See *Stewart v. Rutherford*, 74 Ga. 435, and the same rule would apply. The rule should be the same as to a corporation defrauding a person out of his money.

It has long been held that in the original organization of a corporation the subscribers have a right to recover back from the promoters moneys paid where it develops that fraudulent representations have been made. See *Green v. Barrett* (1826), 1 Sim. 45; *Jarrett v. Kennedy* (1848), 6 C. B. 319; *Butt v. Montaux*, 1 Kay and J. 98, 24 L. J. C., N. S. 99; *Harvey v. Collett* (1846), 15 Sim. 332.

Similarly it was held at an early date that subscribers to stock were entitled to relief in equity where the conduct of the directors in procuring the subscription had been fraudulent. *Blain v. Agar* (1826), 1 Sim. 37; *Bosher v. Richmond and H. Land Co.*, 89 Va. 455; *Ex parte Ward*, L. R. 3 Exch. 180. It is held in *Vreeland v. New Jersey Stone Co.*, 29 N. J. Eq. 188, that subscriptions to the stock of a corporation procured by fraud will be set aside. Where through the fraud and deception of the officers of a corporation one is induced to subscribe for stock, he may rescind the contract upon discovering the fraud, and recover back the amount paid. *Lare v. West Moreland Specialty Co.*, 155 Pa. 33. In *Grangers' Ins. Co. v. Turner*, 61 Ga. 561, it was held that upon discovering the fraud the subscriber might rescind the contract and recover back the money, or he might repudiate his contract and proceed against the corporation as for money had and received.

Estoppel to Rescind.—Where in cases similar to the principal case the subscriber has not gotten relief, it is usually on the ground that he has been estopped. His right to rescind would otherwise be good, but by his own conduct he is estopped. An act done after the discovery of the fraud, inconsistent with a disaffirmance of it, has been held to be a waiver of it. *Welsiger v. Richmond Ice Mach. Co.*, 90 Va. 795. He may also be estopped where he was in possession of facts which put him on inquiry. It has been held that where, after the discovery of the fraud, the subscriber attempts to sell his shares, he cannot afterward repudiate his liability on them. *Ex parte*

Briggs (1866), L. R. 1 Eq. 483. It has also been held that the discontinuance of a suit for rescission is a waiver of the right to rescind.

The rights of a stockholder may also be controlled by other factors, as where he has paid additional assessments on his stock after discovering the fraud, where he has been guilty of laches, where he has had the means of discovering the facts for himself, but has neglected to do so, where he has received the profits of the transaction after discovery of the fraud.

The principal case is sound in law and in morals. There is no reason why a corporation should be permitted to profit by its misrepresentation. It should be noted that the misrepresentations were as to existing facts, and not expressions of opinion as to what might develop in the future. The representations were false, and were known by the officers of the company to be false. They were made on behalf of the company, which received the benefit of them. The subscriber, so far as appears, did not know the true conditions, and purchased the stock in reliance on the representations made.

JETSAM AND FLOTSAM.

VESTED RIGHT IN LIQUOR BUSINESS.

In apparent seriousness a bill has been introduced into the New York Legislature to provide that a town shall pay to saloonkeepers or other liquor dealers for injury to their business if a vote for local option shall prohibit its further continuance. This proceeds on the assumption that one who has obtained a tax certificate under the New York liquor tax law of 1896 thereby acquires a vested right in perpetuity for the continuance of his business in the same place, in spite of any subsequent changes in the law or any vote for local option under the existing law. It might be supposed that this bill was introduced as a joke, but, as it seems to be offered seriously, it is proper to inquire what, if any, foundation there can be for such a claim. The statute expressly provides that it shall be illegal to carry on the liquor traffic without having a liquor tax certificate. Those certificates must be obtained yearly on the 1st day of May. A certificate obtained at any later date will expire with all other certificates at the 1st of May following. By what course of reasoning can one conclude that allowing a business to be carried on for a specified period on certain conditions impliedly grants an unconditional and absolute right to carry it on perpetually. Or how can a certificate obtained under a statute which expressly provides that it cannot be issued except on certain conditions of local option be exempt from such local option provisions? So far as the construction of the statute is concerned, any contention that a vested right can be obtained under it which will be exempt from the local option features of the act itself needs only to be clearly stated to furnish its own answer. But the real contention seems to be that the act of the Legislature itself is unconstitutional on the ground that the Legislature has no power to prohibit the sale of liquors without compensation to the dealers who have been previously engaged in the traffic, because they have vested property rights in the busi-

ness. A memorandum filed with the bill in the New York Legislature contains the following proposition: "Inasmuch as liquor and the property used in its manufacture and sale have been fully recognized as property by the decision of the court of appeals; and the vested right to sell in a given place recognized by the existing law providing for its taxation and regulation of sale, such property may be accorded all of the rights of property under the Constitution. The so-called police power cannot nullify the guaranties of the Constitution and outlaw property in liquor or buildings employed in manufacture and sale." This contention amounts to a claim that every saloonkeeper or liquor seller who has at any time engaged in the business in conformity to the existing law thereby becomes vested with a constitutional right to carry on such business in perpetuity at that place, because this amounts to a property right which cannot be taken from him without payment of compensation. A short answer to this contention is that it is expressly negatived by the whole range of judicial decisions on the subject in this country. For generations local option laws and various other regulations of the traffic have been on the statute books of the different states and upheld by the courts. In most cases the constitutionality of the statutes has been taken for granted; in some cases it has been stoutly contested; but it has been unequivocally sustained by the courts. The police power of the Legislature over all such questions as that of the restriction of the liquor traffic has been upheld so long and so emphatically that any contention against it now deserves scant respect. On similar questions of police power the supreme court of the United States has unmistakably decided, as in *Stone v. Mississippi*, 101 U. S. 814, 25 L. Ed. 1079, that the Legislature cannot be prohibited from exercising that power, even by its own previous enactments which were intended to constitute contracts. Such attempted contracts are held to be necessarily void because the Legislature cannot contract away its right to exercise the police power.

The claim that the New York court of appeals has held that liquor dealers have a vested right to continue their business, and that a law prohibiting its continuance would be unconstitutional, was also made recently on behalf of the wine-growers' association before the judicial committee of Congress in opposition to proposed legislation affecting interstate commerce in liquors. The printed argument before the committee says: "The state of New York once passed a prohibition measure, and the court of appeals declared the law unconstitutional, as it destroyed property without due process of law." Such statements misrepresent the court of appeals decision. That court did hold, in *Wynehamer v. People*, 13 N. Y. 378, that the prohibition law of 1855 was unconstitutional. But the unconstitutionality which the court condemned was in the provisions of the law which were held substantially to destroy without compensation the liquors which were in existence in the state when the law was passed. The court did not hold that liquor dealers had any vested right to continue to carry on their business, or that a statute would be unconstitutional if it took away their right to carry on such business thereafter, without giving them any compensation. In fact, one of the headnotes to the case expressly says: "It seems that had the act, by its terms, been applicable only to liquors imported or manufactured after it took effect, it would not

have been in conflict with the constitutional provision above mentioned." I. e., as to due process of law. This decision therefore is not in conflict with the mass of other decisions on the question which fully establish the power of the Legislature as a police measure, in the interest of the public welfare, to regulate or prohibit the sale of intoxicating liquors. The theory of some enthusiastic temperance people that the common law makes all liquor selling illegal, and the theory of liquor traffic that they have a vested property interest in the business, are equally extreme and equally opposed to the long settled law of this country. Both show how easily many people can believe what they wish to be true. Whatever may be the rights in England of those whose tipping houses are abolished by law, that question is no longer open in the United States.

TOUGH ON THE SUPREME COURT OF ILLINOIS SITTING "EN BANC."

At the October Term, A. D. 1907, the Supreme Court of Illinois, in the case of *Brown v. Cragg et al.*, handed down an opinion reversing the judgment of the appellate court, which required Brown, an appellant, to account, under a partnership agreement, for certain stock.

The case turned upon the question of agency; given the agency, the accounting followed.

The question of agency is a question of fact made known by the records. A court of review is concerned exclusively with conclusions of law from the facts of the record, and is bound by such facts.

In the opinion, written by Mr. Justice Dunn, it was denied that there was any evidence of an agency in the record.

In a petition for rehearing filed by Messrs. Harlan and Bates, there were printed side by side this denial of the court, and a letter shown of record, as follows:

Opinion of the court, page 4.

"There was no intimation on the part of appellant or any stockholder. * * * That appellant was the agent or attorney for any stockholder."

Abstract, page 318: "February 19th, 1902.

Messrs. Alfred Stromberg and
Androv Carlson.

No. 76 West Jackson boulevard,
Chicago, Ill.

Gentlemen:—

Referring to the option which you have given in the Stromberg-Carlson Telephone Manufacturing Company, it is understood that this option is limited to the contemplated transaction with Satterlee and Finucane, of Rochester, New York. I have given to Messrs. Satterlee and Finucane an agreement to deliver this and other stock, if paid for any time prior to noon on the 27th of March, 1902, at the price named in the option. If Messrs. Satterlee and Finucane do not accept this offer, the entire transaction terminates, and your option expires. Yours very truly,

CHARLES A. BROWN."

Abstract page 275.

If one acts for another, he is an agent; if one, acting for another, agrees to deliver property not his own, he is an agent; if one, in writing to another, expressly says that he has agreed to deliver another's property, he is an

agent by his own admission, and he is estopped to deny it.

A conclusion of law from a statement of facts at variance with the record is a failure of justice. If the justice, charged with the careful inspection of the record, has mistaken or overlooked essentials of the record, it is the duty of his brethren sitting with him to assist him to correct his judgment and amend his error, granting to those claiming to be injured by his oversight the privilege of a new presentation, and a prayer for such privilege, is not in its nature argumentative.

If his brethren, assembled with the one manifestly in error, as shown by citation from the record, refuse to grant a hearing or to reconsider or amend their opinion, the failure of justice becomes more apparent.

A rehearing was denied.

GEO. W. THOMAS.

Chicago, June 11, 1908.

A LAWYER ON LEGAL ETHICS.

Some time ago Governor Hughes of New York raised a standard for lawyers that might be considered rather high for every-day humanity. He declared that no case should be taken against the public interest. But if that be counsel of perfection, the article of Frederick Trevor Hill, a New York lawyer and author of note, in the current Putman's on legal trickery and the disrepute into which the profession is falling, certainly demands nothing heroic of the average lawyer. It only asks him to refrain from twisting and turning the law in the interest of clients who do not deserve success. It asks him to be decently scrupulous and honest.

Mr. Hill does not hesitate to say that "lawyers are coming to be looked upon by fair and broad-minded men as defeaters of the law and mockers of its majesty." He attributes this to the fact that the typical modern lawyer is addicted to quibbling, trickery and technicality, and cares nothing about justice, the merits of the case, or the real issues. He thinks it altogether proper to confuse the court and get "reversible error" into the record by hook or crook. He prepares snares and pitfalls for the judge, and rejoices when the efforts are successful. He stretches statutes and solemnly argues for interpretations that he knows to be preposterous. He defeats honest claims, regardless of all moral considerations, so long as some loophole for the rascally client can be discovered. He deceives legislators into putting jokers into bills and then goes into court to invalidate the acts fashioned by himself with an air of innocence and good faith. He takes advantage of the failure of a plaintiff to observe the most technical and obscure rules of practice. He will "get off" criminals and turn them loose in the community on the most trivial and transparent pretexts. And so on, to the end of the indictment.

Mr. Hill gives a number of striking illustrations, especially from criminal practice, to illustrate his charges. For example, a burglar who had robbed a railway station and killed a constable was once saved from conviction on a charge of murder in the first degree by the point that the statute in regard to burglary was so worded as not to cover railway stations, and that the constable had been guilty of trying to make an illegal arrest in interfering with the burglar.

Only lawyers can so well expose legal chicanery and artful dodging, and it is to be hoped that Mr. Hill's example will be widely followed by other conscientious members of the profession. As he says, lawyers should see themselves as others see them.—Law Student's Helper.

LAWYERS AND OUT-LAWYERS.

A subject gravely discussed at the meeting of the Illinois Bar Association last week was whether lawyers who advise and guide clients in law-breaking violate the ethics of the profession.

Not many years ago there would have been only one answer to a question of this kind, but corporation law and corporation lawyers have created a new condition of affairs.

While the activity of legislators, wise and unwise, has introduced many serious problems in the management of corporations with which lawyers have been compelled to deal, a wide field has been created also for the lawyer, who is expert in evasion and sophistry and bold in execution.

Out-lawyers of this description have been profitably employed of late, not so much with a view to the interpretation of laws as to their safe and successful violation. Their clients have known all about the laws. What they wanted was a legal advisor who could and would pilot them in security through the perils of law breaking.

Every sharp corner that has been turned by the exploiters who have operated through corporate machinery has been rounded hand in hand with a lawyer in full credit at the bar. There is no knavery known to men which has not thus been practiced under the direction of lawyers. So important and so lucrative has this line of work become that the phrase "corporation lawyer" is synonymous with great wealth rather mysteriously acquired.

Many of our captains of finance and practically all of our banditti of business would have operated in much narrower fields if they had not found counselors at law ready for a fee to become counselors of lawlessness. How to violate law, how to derive all the pecuniary advantages of violation of law, how to be a lawbreaker and yet be able to hold up one's head and to accumulate wealth—these have been the problems with which the out-lawyers have had to deal.

Every great center of population has had and still has professionals of this class. They have done as much to debauch business and financial methods, to subject the courts to criticism and to awaken the animosities of class as they have to lower the standards of their own profession.

Bar associations are tardy in taking up this subject for serious consideration, but, properly actuated, they may accomplish much good even now.

BOOK REVIEWS.

AMERICAN STATE REPORTS, VOL. 117.

The general plan of this volume is the same as in the former volumes. Cases of importance are selected from the various states, which are published with notes containing a statement of

the law, with authorities in support of the propositions. In these case notes the law is very thoroughly presented. The note on Subletting of Leased Premises is a good example. This topic is treated under four headings, as follows. I. Right of Tenant to Sublet; II. Covenants Against Subletting; III. What Constitutes a Subletting; IV. Rights, Liabilities, and Remedies of Parties. Under these topic headings are eighteen sub-headings, the note occupying nine or ten pages. Other subjects are as thoroughly treated. Published by Bancroft-Whitney Co., San Francisco.

CYCLOPEDIA OF LAW AND PROCEDURE, Volume 27.

The profession are quite generally familiar with former volumes of this great cyclopedia. Its great advantage over some other encyclopedias is that both the law and procedure are given in one volume. "Cyc." as it is cited, is an authority on the subjects treated, as is evidenced by frequent citations in the decisions. The present volume is up to the standard, and presents among other important branches of the law such subjects as Mechanics' Liens, Mercantile Agencies, Mines and Minerals, Money Lent, Money Paid, Money Received, Mortgages. Cyc treats the subjects thoroughly, presenting first a complete analysis of a subject, then a statement of the law, with citations. Following the statement of the substantive law is the adjective law. Published by The American Law Book Co., New York.

FEDERAL USURPATION.

The author, Franklin Pierce, states that his book was suggested by a speech in which President Roosevelt declared that the power of the federal government should be increased "through executive action . . . and through judicial interpretation and construction of law." The following are the titles of chapters: Birth of the Constitution, Usurpation in the Civil War and Reconstruction Period, Executive Usurpation, Paternalism and Imperialism, Congressional Usurpation, The United States Supreme Court the Absolute Power, Treaty Powers and State Rights, The Interstate Commerce Clause, State Centralizations Through Commissions and Courts, Usurpation in Administrative Law, How to Restore the Democratic Republic. It will be seen that the subject has received the serious consideration of the author, who earnestly believes that within the past few years changes of vast import have taken place, by which the federal government has assumed control over subject matter not committed to it by the constitution. There are to-day, as at the time of the adoption of the constitution, conflicting views. There are those who believe with the President that the constitution should be construed liberally in favor of the federal government, in its effort to extend its power. Others hold to the idea that the federal government has no powers save those expressly conferred, or conferred by necessary implication, and that there should be a strict construction. Whether or not there has been an usurpation by the federal government of powers not conferred, it is at this time exercising powers never dreamed of in the olden days. The book is interesting, readable, and on a timely subject, which will doubtless engage the serious attention of the American people during the

next few years. Published by D. Appleton & Co., New York.

HUMOR OF THE LAW.

You would never guess it, of course, but it's true, nevertheless. In spite of his name, Philander Chase Knox, former attorney-general of the United States, and now senator from Pennsylvania, with hopes of more to come, is an Irishman. He said so at a dinner on last St. Patrick's Day.

"What I admire most in the Irish character is the Irishman's tenacity," he said. "There never yet was an Irishman who gave up a fight before he was whipped, and there never yet was an Irishman who knew when he was whipped."

"Up in a Pennsylvania lumber-camp, for instance, one not very friendly son of St. Patrick happened to be carrying a log upon the edge of a steep incline, when he lost his footing and, with the log, started to fall downhill. Over and over he rolled, the log held fast in his embrace, and his friends above, fearing that he would be crushed, called out.

"Drop it, Dennis! Let go the log!"

"Drop it, however, Dennis did not, and when his companions reached the foot of the hill they found him lying upon it, exhausted but smiling.

"Confound it, Dennis," they inquired, "why didn't you let go the log?"

"Phy didn't I?" responded Dennis, "An' phy should I now? It was a fair fight, and wasn't I on top half the toime?"—Saturday Evening Post.

An eminent lord chief justice, who was trying a right of way case, had before him a witness—an old farmer—who was proceeding to tell the jury that he had "knowed the path for sixty yeer, and my feyther told I as he heered my grandfeyther say—"

"Stop!" said the judge; "we can't have any hearsay evidence here!"

"Not!" exclaimed Farmer Gies. "Then how dost know who thy feyther was 'cept by hearsay!"

After the laughter had subsided the judge said: "In courts of law we can only be guided by what you have seen with your eyes, and nothing more or less."

"Oh, that be blowed for a tale!" replied the farmer. "I ha' got a bile on the back of my neck, and I never seed 'un, but I be prepared to swear that he's there, hang 'un!"

This second triumph on the part of the witness let in a torrent of hearsay evidence about the footpath which obtained weight with the jury, albeit the judge told them it was not testimony of any value, and the farmer's party won.

Sergeant Kelly, of the Irish bar, had an inveterate habit of drawing conclusions directly at variance with his premises. In consequence of this peculiarity he was called "Counsellor Therefore." Curran said he was a perfect human personification of a non sequitur. One day, meeting Curran near St. Patrick's, he said:

"The Archbishop gave us an excellent dis-

course this morning. It was well written and well delivered. Therefore I shall make a point of being at the Four Courts to-morrow at ten."

His speeches to the jury were interminable. He would say: "This is so clear a point, gentlemen, that it is paying your understandings but a poor compliment to dwell on it even for a moment. Therefore I shall now proceed to explain it to you at greater length."

While the Court tittered, the Sergeant was wholly unconscious of these feats of his own genius for inconsecutiveness.—*Madras Law Journal*.

"There was a white man out in Montana," said Senator Carter, "who was called Steve Crow. He lived with the Indians for forty years, married a squaw and raised a family. Finally his wife died, his children threw him out, and he drifted up to Seattle, where he married again."

"After a time he returned to Montana, and said his second wife had secured a divorce from him."

"What happened, Steve?" asked a friend.

"Why," Steve replied, "that there woman didn't know when she had a good thing. I married her and built a cabin out on the flats. It wasn't my land, but I lived there for awhile. She didn't appreciate her advantages. Why, every morning I went out on the flats and gathered a bushel of clams, and all she had to do was to shuck 'em and cook 'em."

A lawyer whose attainments were scarcely of the first quality was arguing in one of the Philadelphia courts before a patient judge. His argument was not without flaws, and at one point he fairly screamed out that if his client had done wrong then he, the lawyer, was equally wrong, for he failed to see that any fault had been committed.

"But, Mr. Blank," urged the judge, "ignorance of the law excuses no man."

"Your honor," shouted the lawyer, "I do not want any excuse; what I say is excuse enough."—*Green Bag*.

A jury in Blankville was sent out to decide a case, and after deliberating for a time came back, and the foreman told the judge they were unable to agree upon a verdict. The latter rebuked the jury, saying the case was a very clear one, and remanded them back to the jury room for a second attempt, adding:

"If you are there too long I will send you in twelve suppers."

The foreman, in a rather irritated tone, spoke up and said:

"May it please your Honor, you might send in eleven suppers and one bundle of hay."—*Lippincott's*.

The magistrate looked severely at the small, red-faced man who had been summoned before him, and who returned his gaze without flinching.

"So you kicked your landlord down stairs?" said the magistrate. "Did you imagine that was within the rights of a tenant?"

"I'll bring my lease in and show it to you," said the little man, growing still redder, "and I'll wager you'll agree with me that anything

they've forgotten to prohibit in that lease I had a right to do the very first good chance I got."

"Had a case to-day in which two men claimed a rabbit."

"Well, judge, why didn't you divide it?"

"I don't split hares in my court."

WEEKLY DIGEST.

Weekly Digest of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of all the Federal Courts.

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1. **Account**—Equitable Jurisdiction.—Equity has jurisdiction of an accounting, which is not lost because the substantial contest is finally narrowed down to one item.—*Fischer v. Riehl*, Pa., 69 Atl. Rep. 70.

2. **Adultery**—Sufficiency of Indictment.—Even if it is necessary to show on the face of an indictment for adultery that the prosecution was commenced upon the complaint of a person authorized by statute to commence such a prosecution, an indictment for adultery which states that it was found on the complaint of defendant's wife sufficiently shows a complaint by a person authorized to complain by the statute.—*State v. Hayes, Or.*, 94 Pac. Rep. 751.

3. **Adverse Possession**—Question for Jury.—The issue of adverse possession in an action for the possession of real estate held properly submitted to the jury.—*Wright v. Willoughby*, S. C., 60 S. E. Rep. 971.

4. **Appeal and Error**—Bill of Exceptions.—Where there is no bill of exceptions in the record, questions on the admission or exclusion of testimony cannot be considered on appeal.—*State v. Hayes, Ore.*, 94 Pac. Rep. 751.

5.—**Harmless Error**.—A judge should refer to the evidence only so far as is necessary to present the leading issues; but, where any error is favorable to plaintiff in error, he cannot complain thereof.—*Farkas v. Brown, Ga.*, 60 S. E. Rep. 1014.

6.—**Harmless Error.**—Failure of the court to rule on every request for a finding of fact or conclusion of law is not reversible error, if the request is frivolous, or the facts asked to be found are immaterial.—*Myersdale & S. St. Ry. Co. v. Pennsylvania & M. St. Ry. Co.*, Pa., 69 Atl. Rep. 92.

7.—**Judgment Entered in Vacation.**—Though a judgment was, without authority, entered in vacation, yet where, after the court convened, the matter was again taken up and a like judgment entered, held, that there would be no reversal, but that the first judgment entered in vacation would be set aside and the second left unaffected thereby.—*Broadway Nat. Bank v. Kendrick*, Ga., 60 S. E. Rep. 998.

8.—**Attorney and Client.**—Authority of Attorney.—As the death of the principal terminates the agency, held that, where a judgment creditor had died and no personal representative had been appointed, a person liable to decedent on recognizances for court costs had no authority to pay the costs to decedent's former attorney.—*Wells v. Foss*, Vt., 69 Atl. Rep. 155.

9.—**Powers of Attorney.**—The mere fact of employment of an attorney by a client does not authorize the attorney to contract with another attorney that the client shall pay the latter for his services as counsel.—*Bently v. Fidelity & Deposit Co. of Maryland*, N. J., 69 Atl. Rep. 202.

10.—**Bail.**—Transfer of Cause.—On transfer of an indictment, with a bond given thereon, by the superior court to a city court, the latter court has jurisdiction over all subsequent proceedings, including forfeiture of the bond.—*Marks v. Smith*, Ga., 60 S. E. Rep. 1016.

11.—**Bills and Notes.**—Attorney's Fees.—Where, in an action on a note, a verdict for but a single sum was returned, it was not error to charge that plaintiff would be entitled to attorney's fees.—*Smith v. Pilcher*, Ga., 60 S. E. Rep. 1000.

12.—**Liability of Indorser.**—The liability of the indorser of a check is impliedly conditioned on its prompt presentment for payment and notice of non-payment, and a failure in those respects will discharge him, though presentment in due course would have been unavailing.—*Start v. Tupper*, Vt., 69 Atl. Rep. 151.

13.—**Boundaries.**—Ascertainment.—On the issue of the location of disputed boundary lines in deeds, evidence of the location of lines by surveyors under agreement of the parties held competent to show a settlement of disputed lines.—*Wright v. Willoughby*, S. C., 60 S. E. Rep. 971.

14.—**Bridges.**—Notice of Claim for Injuries.—A notice of a claim for injuries to a traveler caused by a defective bridge held sufficient to render admissible in evidence the fact that a doctor prescribed remedies for the traveler, together with what the remedies were.—*Graves v. Town of Waltsfeld*, Vt., 69 Atl. Rep. 137.

15.—**Carriers.**—Loss of Goods.—The presumption of liability of a carrier raised by Civ. Code 1895, § 2264, is rebutted where it appears that the injury was caused by the shipper himself.—*Coweta County v. Central of Georgia Ry. Co.*, Ga., 60 S. E. Rep. 1018.

16.—**Certiorari.**—Judgment.—Any disposition on the merits of a certiorari is premature until the traverse to return has been disposed of.—*Georgia, F. & A. Ry. Co. v. Sizer & Co.*, Ga., 60 S. E. Rep. 1026.

17.—**Constitutional Law.**—Validity of Statutes.—The constitutionality of an act will be passed on only when it becomes necessary to do so in

determining the rights of litigants.—*State v. Jennings*, S. C., 60 S. E. Rep. 967.

18.—**Continuance.**—When Allowed.—A party is not entitled to a continuance because one has been previously granted to his opponent.—*Hutcherson v. Ladson*, Ga., 60 S. E. Rep. 1000.

19.—**Corporations.**—Consolidation.—A stockholder in a corporation held barred by laches from maintaining a suit to arrest the completion of a merger of his corporation with others.—*Dana v. American Tobacco Co.*, N. J., 69 Atl. Rep. 223.

20.—**Criminal Trial.**—Acts Constituting Continuous Offenses.—Several offenses evincing a continuous state of mind, and culminating in the criminal act for which indictment is had, held admissible on the trial of such indictment.—*State v. Deliso*, N. J., 69 Atl. Rep. 218.

21.—**Damages.**—Growing Crops.—Where growing crops are totally destroyed by negligence, the measure of recovery is the fair market value at the time of their destruction.—*Smith v. Chicago, B. & Q. R. Co.*, Neb., 115 N. W. Rep. 755.

22.—**Intoxicating Liquors.**—In an action by a widow for herself and as next friend for her minor child against a liquor dealer to recover for the alleged wrongful killing of plaintiff's husband, the measure of damages determined.—*Young v. Beveridge*, Neb., 115 N. W. Rep. 766.

23.—**Speculative and Remote.**—In an action for an injury to an established business by the breaking of a show window, testimony that the normal Christmas trade had been interfered with is too remote and uncertain on which to base a verdict for plaintiff.—*Bates v. Warrick*, N. J., 69 Atl. Rep. 185.

24.—**Death.**—Proximate Cause.—Defendant held not relieved of the consequence of its negligence where the one injured, acting in good faith, and without negligence, produced a hemorrhage from the original wound, from which death ensued.—*Batton v. Public Service Corp. of New Jersey*, N. J., 69 Atl. Rep. 164.

25.—**Right of Action.**—Under Comp. Laws, §§ 10,427, 10,428, an administrator appointed in this state may maintain an action for the death of intestate by defendant's negligence for the benefit of non-resident aliens who are the sole distributees of deceased's estate.—*Mascitelli v. Union Carbide Co.*, Mich., 115 N. W. Rep. 721.

26.—**Deeds.**—Construction.—Where a description by metes and bounds closes, and the only apparent error is in one of the distances, the question is for the court, and not of locating the description on the ground for the jury.—*Schmitt v. Traphagen*, N. J., 69 Atl. Rep. 189.

27.—**Detinue.**—Action on Bond.—In an action on a detinue bond, the element of title is to be determined as of the date of the seizure or wrongful withholding of possession under the writ.—*Young v. Edwards*, W. Va., 60 S. E. Rep. 992.

28.—**Dismissal and Non-Suit.**—Request for Judgment.—Motion to dismiss because no request for the entry of judgment was made within six months after the filing of findings and conclusion of law under Code Civ. Proc. § 581, sub. 6, held addressed to the discretion of the court.—*Rickey Land & Cattle Co. v. Glader*, Cal., 94 Pac. Rep. 768.

29.—**Divorce.**—Alimony.—Where alimony was awarded defendant, but was not paid by plaintiff, an execution and levy under the decree in ex parte proceedings held void where plaintiff

was not given notice of the proceedings, and no testimony was taken.—*Dewey v. Dewey*, Mich., 115 N. W. Rep. 735.

30. **Elections**—Non-Resident Electors.—Under St. 1898, §§ 23, 61, an unregistered elector's right to vote on an otherwise insufficient affidavit held not aided by the fact that no other form of affidavit was at hand.—*State v. Trask*, Wis., 115 N. W. Rep. 823.

31. **Eminent Domain**—Compensation.—A city may not, without making compensation for the property appropriated, collect water from a large area, and by artificial means cast it on the lands over or through which it would not otherwise flow, to the injury of the owner thereof.—*Doremus v. City of Paterson*, N. J., 69 Atl. Rep. 225.

32.—**Effect of Procedure**.—Where a railroad condemns a right of way, such proceedings transfer the land to the railroad company, and, in lieu thereof, the owners will receive the damages awarded in the same proportions in which they held the land.—*Dye v. Midland Valley Ry. Co.*, Kan., 94 Pac. Rep. 785.

33.—**Measure of Damages**.—In an action for damages to land caused by the erection thereon of a line of telephone poles and wires, the measure of damages is the difference in value of the land before and after the burden of easement thus imposed upon it.—*Wade v. Carolina Telephone & Telegraph Co.*, N. C., 60 S. E. Rep. 987.

34. **Equity**—Jurisdiction.—Where a deed retains a life estate in the grantors, with free use and possession, the law gives them a complete remedy for the recovery of the possession, and equity will not entertain jurisdiction.—*McDonald v. Jarvis*, W. Va., 60 S. E. Rep. 990.

35. **Evidence**—Expert Testimony.—A civil engineer who had made a special study of bulkheads could express an opinion whether a bulkhead with a filling of sand behind it or a bulkhead without such filling was more likely to resist ocean storms.—*N. Risley & Sons v. Ocean City Development Co.*, N. J., 69 Atl. Rep. 192.

36.—**Pecuniary Condition**.—The statement of a witness testifying as to the pecuniary condition of a party held to indicate that it referred to the party's financial condition, and its admission was not erroneous because of the possibility that it means something else.—*Lincoln v. Hemenway*, Vt., 69 Atl. Rep. 153.

37.—**Self-Serving Declarations**.—On an issue of whether a sale of furniture was conditional or not, a mortgage thereof given by purchaser held properly excluded as being merely a self-serving act.—*Lazarovich v. Tatilbum*, Me., 69 Atl. Rep. 275.

38.—**Statement of Witness**.—A statement of a witness as to the probable effect of liquor consumed by the patron of a dealer is inadmissible to prove the nature of the liquor, but its admission is not error if it was a part of a conversation properly admitted.—*Young v. Beveridge*, Neb., 115 N. W. Rep. 766.

39.—**Value of Evidence**.—The value of land and the effect thereon of improvements or burdens is essentially a matter of opinion; and hence a question as to the decrease in value of land caused by the erection of telephone poles therein held not erroneously permitted.—*Wade v. Carolina Telephone & Telegraph Co.*, N. C., 60 S. E. Rep. 987.

40. **Execution**—Claims of Third Persons.—Any person having a lien on property seized un-

der execution or interested in the proceeds may come into the court having possession of the property or the proceeds, and assert his rights.—*Balsden & Co. v. Holmes-Hartsfield Co.*, Ga., 60 S. E. Rep. 1031.

41.—**Issuance**.—While the application for an order of execution may be filed, and the order issued, before the enrollment of the decree, by the express provisions of the statutes and the court rules, no execution or process may be issued on any final decree until it has been enrolled.—*Dewey v. Dewey*, Mich., 115 N. W. Rep. 735.

42.—**Withdrawal of Claim Res Judicata**.—Neither a withdrawal of a claim to property levied on nor its dismissal for want of presecution constitutes a bar to the interposition of another claim.—*American Inv. Co. v. Cable Co.*, Ga., 60 S. E. Rep. 1037.

43. **Executors and Administrators**—Sale of Land.—A sale of land by an administratrix held not to be attacked collaterally on the ground that process was not served on the attacking party.—*Rackley v. Roberts*, N. C., 60 S. E. Rep. 975.

44. **Fish**—Legislative Control.—The Legislature is vested full power to control fisheries in the state by appropriate enactments.—*State v. Peabody*, Me., 69 Atl. Rep. 273.

45. **Gifts**—Causa Mortis and Inter Vivos.—The distinction between a gift causa mortis and inter vivos is that the former is subject to the donor's revocation while he lives, but is invalid if the control of the donee is postponed to some future date.—*Beebe v. Coffin*, Cal., 94 Pac. Rep. 766.

46. **Guaranty**—Change of Conditions.—A guaranty to a firm of a customer's running account held not operative as to credit extended after the admission into such firm of a new member.—*John H. Lyon & Co. v. Plum*, N. J., 69 Atl. Rep. 209.

47. **Homicide**—Dying Declarations.—A dying declaration may be discredited by showing the bad reputation of declarant for truth; but not by showing that his general character was bad.—*State v. Tomasi*, N. J., 69 Atl. Rep. 214.

48. **Injunction**—Telephone Construction.—Parties restraining interference with construction of telephone lines by property owners held not entitled to continuance of injunction.—*Northeastern Telephone & Telegraph Co. v. Hepburn*, N. J., 69 Atl. Rep. 249.

49.—**Use of Streets**.—Equity will not in an action by a street railway company under Act June 19, 1871 (P. L. 1360), enjoin a rival street railway from using certain streets, unless plaintiff's title is clear, and the injury threatened is of a permanent and irreparable nature.—*Meyersdale & S. St. Ry. Co. v. Pennsylvania & M. St. Ry. Co.*, Pa., 69 Atl. Rep. 92.

50. **Judges**—Disqualification.—Where the fact of the disqualification of a district judge in making an order confirming a judicial sale appears on the record, the order of confirmation is void, and may be collaterally attacked.—*Harrington v. Hayes County*, Neb., 115 N. W. Rep. 773.

51. **Jury**—Peremptory Challenges.—The essence of the right to reject a juror peremptorily is that it shall afford a person the privilege of saying that some particular juror shall not try him.—*State v. Deliso*, N. J., 69 Atl. Rep. 218.

52.—**Relationship to Accused**.—Under Pen. Code, § 1074, held improper to exclude a juror for cause on a showing that he might be

a fourth or fifth cousin to defendant or "something by marriage."—*People v. Schmitz*, Cal., 94 Pac. Rep. 407.

53. **Landlord and Tenant**—Election to Renew Lease.—Action by lessee of sawmill in book account for rent brought after the expiration of the second year of the lease held not of itself to constitute an election to allow the lessee to retain the mill a third year.—*Felton v. Chellis*, Vt., 69 Atl. Rep. 149.

56.—Leases.—Where notice of an increase of rental is given a tenant before the expiration of a written lease, and the tenant holds over without dissenting, the new rate of rental will apply, but in other respects the former written lease will govern.—*Williams v. Foss-Armstrong Hardware Co.*, Wis., 115 N. W. Rep. 803.

57. **Life Insurance**—Presumption of Death.—While parents suing on a life insurance policy of their son were bound to exercise reasonable diligence in their search for him, they were not required to prove conclusively that he was dead.—*Modern Woodmen of America v. Gerdorn*, Kan., 94 Pac. Rep. 788.

58.—Warranty.—In a suit on a life insurance policy, held, that the evidence was insufficient to show that the words of the warranty that assured had not been under care of physician for two years were used with any other than their usual meaning.—*Fish v. Metropolitan Life Ins. Co.*, N. J., 69 Atl. Rep. 176.

59. **Limitation of Actions**—Alimony.—Where alimony was awarded to be paid in weekly installments, an action for the amount of installments accruing within the statutory period of limitations held not barred by the statute.—*Dewey v. Dewey*, Mich., 115 N. W. Rep. 735.

60.—Effects of Request Not to Sue.—A request not to sue for a tort with the expression of opinion that the matter would be adjusted held not to arrest the running of limitations.—*Brown v. Atlantic Coast Line R. Co.*, N. C., 60 S. E. Rep. 985.

61.—Relief on Ground of Fraud.—By the express provisions of Code Civ. Proc. § 338, an action to rescind certain instruments on the ground of fraud is not barred, though the instruments were executed more than three years before its commencement, where it is shown that the fraud relied on was discovered within a year of the filing of the complaint.—*Richards v. Farmers' & Merchants' Bank*, Cal., 94 Pac. Rep. 393.

62. **Malicious Prosecution**—Petition.—A suit to recover for the malicious use of civil process cannot be maintained without proof of malice and want of probable cause, and the petition should allege that the proceedings had terminated in favor of defendant therein before his action for damages was filed.—*Clement v. Orr*, Ga., 60 S. E. Rep. 1017.

63.—Probable Cause.—In an action for malicious prosecution, the question is not whether the person charged with a crime is guilty, but whether the prosecutor had reasonable ground for believing in the existence of probable cause.—*Robitzek v. Daum*, Pa., 69 Atl. Rep. 96.

64. **Mandamus**—When Writ Issues.—A writ of mandamus held the only adequate mode of relief where an inferior tribunal refuses to act on the subject properly brought before it.—*Higgins v. Brown*, Okla., 94 Pac. Rep. 703.

65. **Marriage**—Common Law Marriage.—A common law marriage is invalid if originally contracted and consummated in the state, but

is valid in the state if contracted and consummated in another state where common law marriages are lawful.—*Nelson v. Carlson*, Wash., 94 Pac. Rep. 477.

66.—What Constitutes.—The mere fact that a person not authorized to solemnize a marriage read the marriage service of the Episcopal Church and the parties to the alleged marriage made answer to the questions therein is not sufficient to show a ceremonial marriage.—*Weidenhott v. Primm*, Wyo., 94 Pac. Rep. 453.

67. **Master and Servant**—Duty of Obedience.—It is the duty of an employee of a railway company to obey a superior as to the work in hand, unless by such obedience he should expose himself to manifest hazard.—*Southern Ry. Co. v. Rutledge*, Ga., 60 S. E. Rep. 1011.

68.—Duty to Warn Servant.—A master held required to warn a servant of the danger of doing dangerous work in a certain way, and to instruct him as to proper method of doing the work.—*Disalets v. International Paper Co.*, N. H., 69 Atl. Rep. 263.

69.—Hazard of Employment.—If the controlling proximate cause of an injury to a servant is an independent act of negligence on the part of the master, he is liable, though a hazard of the employment known to the servant may have contributed to the injury.—*Seaboard Air Line Ry. v. Witt*, Ga., 60 S. E. Rep. 1012.

70.—Injury to Servant.—Where a servant is injured while voluntarily working outside of the scope of his employment, the master is not chargeable with negligence for failing to warn him of his danger.—*Marshall v. Burt & Mitchell Co.*, N. J., 69 Atl. Rep. 183.

71.—Injury to Third Person.—An employer of an independent contractor may become liable for an injury to a servant of the contractor either because of his own wrongful act or by interfering and assuming control.—*Johnson v. Western & A. R. Co.*, Ga., 60 S. E. Rep. 1023.

72.—Reliance on Care of Master.—In an action against a railroad for death of an employee through being struck while standing on top of a car flagging trains by a water tank spout, evidence examined, and held to tend to show that deceased did not know and comprehend the danger.—*McDuffee's Adm'x v. Boston & M. R. R.*, Vt., 69 Atl. Rep. 124.

73.—Safe Place to Work.—It is the duty of a railroad company operating a water tank and spout at the side of its track to place the spout when it can reasonably do so at a reasonably safe distance from the track, so as not to endanger employees working on trains.—*McDuffee's Adm'x v. Boston & M. R. R.*, Vt., 69 Atl. Rep. 124.

74. **Mechanic's Liens**—Materialmen.—The right of a materialman to a lien against the property or the unpaid portion of the contract price does not depend upon the material being ordered by the contractor, but, under Code Civ. Proc. § 1183, depends only upon the furnishing of the material, and its use in the building.—*Los Angeles Pressed Brick Co. v. Los Angeles Pacific Boulevard & Development Co.*, Cal., 94 Pac. Rep. 775.

75.—Signature of Lienor.—A claim of lien held erroneously rejected on the ground that it was not signed by the party who claimed the lien.—*Broxton Artificial Stone Works v. Layers*, Ga., 60 S. E. Rep. 1012.

76. **Mines and Minerals**—Partnership.—A mining partnership may exist, though all of the partners may not have a personal interest in the property, if they have an interest in the

working of the property, and it is not essential that there be an express agreement to become partners, or an express agreement to share profits and losses.—*Bentley v. Brossard*, Utah, 94 Pac. Rep. 736.

77. **Mortgages**.—Contract to Reconvey.—Where a mortgagor conveyed property to mortgagee after default, he has a right of action against the mortgagee on refusal to reconvey on tender of the amount of the debt as agreed by parol for breach of contract.—*Wingenroth v. Dellenbach*, Pa., 69 Atl. Rep. 84.

78. **Foreclosure**.—Mortgagor cannot defend foreclosure on the ground that he did not know of forfeiture clause for default in interest without alleging fraud or mistake.—*Cunningham v. McCready*, Pa., 69 Atl. Rep. 82.

79. **Interest**.—Stipulation in bond and mortgage as to payment of interest held controlling, though money was not paid over to the borrower until a date later than that fixed therein for commencement of interest.—*Kuerzi v. Scott*, N. J., 69 Atl. Rep. 248.

80. **Municipal Corporations**.—Bonds.—The issue of bonds by a city for the purpose of purchasing grounds and erecting school buildings thereon is a "corporate purpose," within Const. 1868, art. 9, § 8, providing that cities, etc., may be vested with power to assess and collect taxes for corporate purposes.—*Jordan v. City of Greenville*, S. C., 60 S. E. Rep. 973.

81. **Discharge of Employee**.—In proceedings for the discharge of a member of the fire department a finding that defendant introduced another fireman to S. for the purpose of securing the influence of S. in the fireman's behalf to obtain a higher appointment and a better rating on the eligible list of employees held justified.—*People v. O'Brien*, 109 N. Y. Supp. 64.

82. **Pollution of Stream**.—A city held not responsible for so much of the street wash as goes into a stream from the surface of the streets, unless it, by artificial means, diverts the wash into sewers emptying into the stream.—*Doremus v. City of Paterson*, N. J., 69 Atl. Rep. 225.

83. **New Trial**.—Refusal.—Where under the admissions in defendant's answer and the evidence the verdict for plaintiff was fully authorized, there was no error in refusing a new trial.—*Hutcherson v. Ladsen*, Ga., 60 S. E. Rep. 1000.

84. **Nuisance**.—Right to Abate.—The right of an individual suffering peculiar injury to abate a public nuisance, as an obstruction in a drainage channel, under some circumstances, is recognized by law.—*Felt v. Elmqvist*, Minn., 115 N. W. Rep. 746.

85. **Parties**.—Necessary Parties.—Certain parties held necessary to an equitable proceeding, and the fact that the complaint stated a cause of action at law not to render erroneous the sustaining of a demurrer for lack of necessary parties to the equitable proceeding.—*Disbrow v. Creamery Package Mfg. Co.*, Minn., 115 N. W. Rep. 751.

86. **Partnership**.—What Constitutes.—In order to constitute a partnership, the members must have joined together to carry on an adventure for their common benefit; each contributing property or services, and having a community of interest in the profits.—*Bentley v. Brossard*, Utah, 94 Pac. Rep. 736.

87. **Paupers**.—Duty of Towns to Relieve.—There is no common law liability of a town to care for paupers; but the whole matter is pure-

ly statutory.—*Town of Morristown v. Town of Hardwick*, Vt., 69 Atl. Rep. 152.

88. **Pleading**.—Action on Note.—Where the declaration in an action on a note is the common counts, and does not refer to the note, the note held no part of the pleading.—*Mayer v. Roche*, N. J., 69 Atl. Rep. 246.

89. **Amendments**.—Though greater liberality than formerly is allowed in the matter of amendments, well-established principles are not to be lightly set aside.—*Anderson v. Wetter*, Me., 69 Atl. Rep. 105.

90. **Answer**.—An answer held not an equivalent of an allegation that defendant had not sufficient knowledge or information to form a belief; and so not to put plaintiff on proof of his allegation.—*State v. Trask*, Wis., 115 N. W. Rep. 823.

91. **Causes of Action**.—Each cause of action set forth in a complaint must stand or fall on its own allegations, without reference to the allegations found in the statement of another cause of action.—*Wright v. Willoughby*, S. C., 60 S. E. Rep. 971.

92. **Principal and Agent**.—Liabilities as to Third Persons.—Agents to procure a purchaser of real estate owe no duty to one offering to purchase, and he is not entitled to recover of them because they communicated to the owner a better offer, which the owner accepted.—*Madden v. Cheshire Provident Institution*, Kan., 94 Pac. Rep. 793.

93. **Notice to Agent**.—Where an agent receives notice in his private capacity of facts not then concerning his principal, but afterwards acts for the principal in a matter in which such fact is material, the notice should be imputed to the principal.—*Henry v. Omaha Packing Co.*, Neb., 115 N. W. Rep. 777.

94. **Public Lands**.—*Muscongus Grant*.—The "Muscongus grant" now known as the "Waldo patent," using simply the word "miles" in defining the distance to which that grant should extend and cover islands in the sea, is to be taken as meaning marine miles and not statute miles.—*Lazell v. Boardman*, Me., 69 Atl. Rep. 97.

95. **Railroads**.—Side-Tracks.—To deny to the state the power to require the erection of depots, the construction of side-tracks and other facilities for the public would enable railroads to create a monopoly in handling products of the country adjacent to their lines.—*State v. Missouri Pac. Ry. Co.*, Neb., 115 N. W. Rep. 757.

96. **Receivers**.—Remedies to Enforce Liens.—Facts held not to constitute such an election as would preclude an amendment of a plea in intervention seeking other relief than that originally asked.—*Ardmore Nat. Bank v. Briggs Machinery & Supply Co.*, Okla., 94 Pac. Rep. 533.

97. **Reformation of Instrument**.—Mutuality of Mistake.—In a suit to reform a contract for the sale of wheat, evidence held to show that it was the intention of the parties to the agreement that the purchaser was to receive on the purchase wheat stored in other warehouses than defendant's, and that the writing should have so specified.—*Smith v. Interior Warehouse Co.*, Ore., 94 Pac. Rep. 508.

98. **Removal of Causes**.—Separable Controversy.—Acts alleged in a complaint against a non-resident mining corporation and its local foreman in charge held to constitute concurrent negligence, preventing removal to the federal court on the ground of separable controversy.—*Stratton Cripple Creek Mining & Developing Co. v. Ellison*, Colo., 94 Pac. Rep. 303.

99. **Replevin**—Right to Possession.—An assignment by vendor of furniture conditionally sold held to transfer all vendor's interest, entitling assignee to maintain replevin on breach of condition.—*Lazarovich v. Tatilbum*, Me., 69 Atl. Rep. 275.

100. **Sales**—Estoppel to Urge Objections.—In action for price of lime and posts sold, held that defendant had waived the right to object to the quality of the lime, or that the posts were deficient in dimensions or not equal in number to the invoice.—*Patrick v. Norfolk Lumber Co.*, Neb., 115 N. W. Rep. 780.

101.—**Evidence**.—In action for price of car load of potatoes certain evidence held inadmissible.—*Hill v. Fruit Mercantile Co.*, Colo., 94 Pac. Rep. 354.

102.—**Executory Contract**.—Certain provisions of contract for the sale of hay held to bring contract within general rule that where anything remains to be done to identify the subject of the sale, the transaction represents an executory contract only.—*Prowers v. Nowles*, Colo., 94 Pac. Rep. 247.

103. **Schools and School Districts**—Mechanics Liens.—A bond given by a contractor to a school district to secure payment for the material used in the construction of a school building is a contract for the benefit of the materialmen, which the latter may enforce.—*R. Connor Co. v. Olson*, Wis., 115 N. W. Rep. 811.

104. **Statutes**—Construction.—Having ascertained that a certain legislative intent extended to all the provisions of a statute, the court will so construe it as to make such intent effective as to the whole statute, if it can do so without doing violence to the express terms thereof.—*Detroit & M. Ry. Co. v. Alpena Circuit Judge*, Mich., 115 N. W. Rep. 724.

105. **Stipulations**—Matters Included.—Sworn answers to interrogatories held within a stipulation permitting the introduction in evidence on the trial of an amended bill of evidence given in the original suit.—*Reeves v. McCracken*, N. J., 69 Atl. Rep. 247.

106. **Street Railroads**—After Acquired Property.—A street railway company held not required to be actually possessed of tangible property when a mortgage was given, approximating the amount of bonds which the mortgage was given to secure, in order that such mortgage might include after-acquired property.—*Chalmers v. Littlefield*, Me., 69 Atl. Rep. 100.

107.—**Use of Streets**.—Citizens having no right to use streets covered by street railway company cannot enjoin the railway company from asserting its rights therein.—*Andel v. Duquesne St. Ry. Co.*, Pa., 69 Atl. Rep. 278.

108. **Taxation**—Tax Deed.—A tax deed which has been recorded five years will not be deemed invalid, if by a liberal construction of its recitals it can be held to contain the recitals required by statute.—*Dye v. Midland Valley Ry. Co.*, Kan., 94 Pac. Rep. 785.

109.—**Tax Titles**.—Where in an action to quiet title the holder of a tax deed is not brought into court more than five years after the recording of the deed, the action will be deemed to be commenced as to him when he was brought into court, and he can then avail himself of the limitations as a defense.—*Gibson v. Freeland*, Kan., 94 Pac. Rep. 782.

110. **Telegraphs and Telephones**—Right of Way.—Right to maintain "telegraph or telephone line or lines" in grant of right of way

for pipe, telegraph and telephone lines construed and held not to import an unlimited number of wires.—*Northeastern Telephone & Telegraph Co. v. Hepburn*, N. J., 69 Atl. Rep. 249.

111. **Torts**—What Constitutes.—Where an owner of an apartment building ordered plaintiff, who, while staying with her son-in-law, the janitor, was taken ill with erysipelas, to leave, held that the owner violated no duty which he owed plaintiff so as to render him liable for any aggravation of illness consequent on her leaving.—*Tucker v. Burt*, Mich., 115 N. W. Rep. 722.

112. **Trial**—Question for Jury.—Where different minds may honestly draw different conclusions as to whether admitted facts prove negligence, the question is for the jury.—*Heney v. Omaha Packing Co.*, Neb., 115 N. W. Rep. 777.

113.—**Reference of Court to Evidence**.—A judge should refer to the evidence only so far as is necessary to present the leading issues; but where any error is favorable to plaintiff in error, he cannot complain thereof.—*Farras v. Brown*, Ga., 60 S. E. Rep. 1014.

114.—**Will Contest**.—In a will contest where questions were asked an attorney as to what testator said concerning his will when making it, which the witness refused to answer, the fact that the offer of proof included some immaterial matters did not exclude proof of that which appeared material.—*In re Young's Estate*, Utah, 94 Pac. Rep. 731.

115. **Trusts**—Construction.—Where the meaning of a written instrument relating to a trust is doubtful, and the law affords the trustee no remedy by which his powers and liabilities may be determined, equity will construe the instrument.—*McDonald v. Jarvis*, W. Va., 60 S. E. Rep. 990.

116.—**Enforcement**.—One entitled to an equitable part of a fund obtained from the proceeds of the sale of crops raised on his farm held entitled to a decree adjudging a lien on the real estate in which the fund is invested, to the amount of his interest in the fund, enforceable as a mortgage.—*Malone v. Malone*, Mich., 115 N. W. Rep. 716.

117. **Trover and Conversion**—Evidence.—The answers of a witness in an action for conversion to questions propounded construed and held not to render his evidence inadmissible on the ground that he was giving his personal knowledge of the transaction, where, in fact, he had no personal knowledge.—*H. C. Jaquith Co. v. Shumway's Estate*, Vt., 69 Atl. Rep. 157.

118.—**Tax Titles**.—In an action to quiet title to land claimed by defendant under a tax deed, the burden held on the purchaser at the tax sale to show that the amount of land sold was no more than was necessary to satisfy the taxes and costs.—*Brush v. Watson*, Vt., 69 Atl. Rep. 141.

119.—**Evidence to Establish**.—Wife claiming securities standing in the name of her deceased husband, in order to establish a trust must show that they were purchased for her from her separate estate.—*Laughlin v. Laughlin*, Pa., 69 Atl. Rep. 288.

120. **Wills**—Testamentary Capacity.—Instances of forgetfulness, untidiness, or inconsequential conversations of an aged person are of themselves no evidence of lack of testamentary capacity.—*Leffingwell v. Bettinghouse*, Mich., 115 N. W. Rep. 731.

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REMEDIES WHEN THERE HAS BEEN A BREACH OF A COMPROMISE AGREEMENT TO A CAUSE OF ACTION OBTAINED BY FRAUD.

The title of this article relates to a class of cases which frequently occur. For example, here is a case when a party has been injured through the negligence of an employer; it is a case of liability; the employer's attorney has secured a release while the injured party is in no fit condition of mind to understand what he has agreed to.

The best test of a good lawyer is his ability to grasp a case so as to secure the best remedy. He must not only be thoroughly posted in the doctrines of the common law, and their relationships, but he must thoroughly understand the facts of his case and their relationships, and yet this is not enough, he must also be as thoroughly familiar with the doctrines of equity and their relationships, to each other and to the common law.

In a case like the one above shown, the truth of our remarks is clearly manifest, for there are three remedies open for an attorney to pursue.

First: He may restore, or offer to restore, what he has received, and then commence his action. In such a case the result is that he proceeds as though no contract of compromise had ever been made. He proceeds upon a rescission.

Second: He may keep what he has received and sue to recover damages for the fraud. In such a case his damages are the difference between what he has received on account of the compromise and the damage he has suffered. Good authorities differ on the advisability of such a course. It would seem better in a case where such fraud may be complained of to ask for equi-

table relief after the compromise agreement has been set up as a defense to the action brought for the injury. Equitable defenses are allowed in many states to actions at law. Logically speaking, the fraud in such a case ought to be regarded entirely as though a suit had been brought in equity to set aside the contract for the fraud, and there is really no distinction between such a course and a common law action, where equitable defenses are allowed except, that in the common law action the jury is to determine the damages and the court has no right to disregard the finding of the jury and enter a judgment for a different amount from that found by the jury. But this seems to enter upon the domain of equity completely, and in the United States courts no such defense is allowable. *Barker v. N. P. R. Co.*, 65 Fed. Rep. 460 and cases cited, 63 Cent. L. J. 35.

It has been held that an equitable defense set up in an action at law is triable upon the same principles that would apply to an original bill in equity brought for the same purpose. *Walls v. Endle*, 20 Fla. 86; *Penny v. Cook*, 19 Ga. 538; *South End Mining Co. v. Trimey*, 22 Nev. 19, 35 Pac. Rep. 89; 38 N. E. Rep. 269; *Murphy v. Hubert*, 16 Pa. St. 50; *Kahn & Old. Tel. Min. Co.*, 2 Utah, 174. The rule in Florida is based upon a comprehensive understanding of the rights of the parties to due process of law, which includes both equity and common law remedies, for it will not permit an equitable defense to be set up in a common law action, unless by so doing complete justice may be done, for it is provided by statute as follows: "In case it shall appear to the court or a judge that any such equitable plea * * * cannot be dealt with by a court of law, so as to do justice between the parties it shall be lawful for such court or judge to order the same struck out. Sec. 64, McC. Dig., p. 827, and id., 826, sec. 55," and Chief Justice Randall said in *Walls v. Endle*, "Any fact which clearly proves it to be against conscience to execute a judgment at law of which the complainant could not

have availed himself of in a court of law, will induce a court of equity to enjoin the judgment." Upon this theory there could be no objection to an equitable defense in an action at law, and there could be no doubt that a statute allowing equitable defenses in common law actions must be so limited, to be constitutional. The case of *Wall v. Endle*, is a very instructive one, including the able briefs of the attorneys.

Third: A party may commence his action in equity to rescind, and for equitable relief, offering in his complaint to restore in case he is not entitled to retain what he has received. If a party is not willing or able to restore what he has received, he is confined to one of the last mentioned remedies. *Gould v. Cayuga Co. Bank*, 86 N. Y. l. c. 84. In this kind of an action, the court proceeds to set aside the compromise agreement, and will then hear and decide the question of the measure of the damages. It is an action for a rescission, and having jurisdiction of the parties and the subject matter may do complete justice, rendering it to the party to whom it is due. That is to say, after setting aside the agreement, if the court finds the plaintiff entitled to more than he has received, it will deduct what he has received from the amount it finds him entitled to, and render him a decree for the difference. If, on the other hand, it finds that the complainant has received more than he was entitled to receive, it will enter a decree accordingly, thus giving effect to the maxim, that he who seeks equity must do equity. See 63 Cent. L. J. 35.

NOTES OF IMPORTANT DECISIONS

CONTRACTS—ADMISSIBILITY OF PAROL EVIDENCE TO VARY.—It is held in *Salmen Brick & Lumber Co. v. Peterson* (La.), 46 So. Rep. 616, that for opening the door to parol evidence to contradict a written act, error or fraud must not simply be alleged, but must be proved, or at any rate the litigant must satisfy the court that he has in his possession the evidence necessary

for the purpose and will offer it later on in the course of the trial.

Plaintiff claimed title through defendant's vendee of record. Defendant denied that he had ever sold his property. He claimed the transaction was a mortgage. That by fraud the transaction took the form of a sale, and that he signed the conveyance. Further that the amount received was but 10 per cent of the value of the property at the time and 5 per cent of its present value. He further alleged that plaintiff purchased with full knowledge of the fraudulent character of the title he was acquiring.

The court held that before parol evidence was admissible to contradict the record sale, the defendant should have introduced evidence of the fraud and error in question.

INSURANCE—COMMENCEMENT OF RISK—PAYMENT OF NOTE.—In *Batson v. Fidelity Mut. Life Ins. Co.* (Ala.), 46 So. Rep. 578, it is held that failure to pay note given for initial premium invalidates the policy. Decedent took out a life insurance policy, gave his note for the first premium. There was a provision on the face of the receipt given that failure to pay the note at maturity operated to end the policy. The note was not paid at maturity. The insured died and suit having been brought, the failure to pay the note was set up as a defense. Judgment in the lower court was for defendant from which plaintiff appealed. In affirming the judgment the Supreme Court of Alabama uses the following language:

"The undisputed evidence is that the initial premium was never paid. The soliciting agent, who delivered the policy, together with the receipt introduced in evidence, instead of collecting and receiving from the assured the initial premium, as was his duty, and which only as such agent he had the authority and power to do, took the note of the assured for the initial premium payable to himself individually at 30 days. This he had no authority to do, and the assured was informed of this want of authority in the agent by the terms of the contract. The note was never turned over to or accepted by the company, and it is not shown that the defendant company ever had any knowledge or notice of this act of the agent until after the death of the assured. The act of the agent in taking the note of the assured for the initial premium, without authority from the defendant company and without any subsequent waiver on its part of the agent's unauthorized conduct, or ratification of said act of the agent, cannot in reason be said to constitute in law an actual

payment of the initial premium within the meaning of the contract.

The receipt delivered to the assured by the agent at the time of the delivery of the policy, and which was introduced in evidence by the plaintiff, was open to explanation by parol evidence. It was shown, and not denied by the plaintiff, that no actual payment of the initial premium was made; and, this being true, the taking of the insured's note by the agent could avail the plaintiff nothing, as it was not paid at maturity, and as, for that matter, it has never been paid, and there being in the face of the receipt given to the assured a condition that the failure to pay the note at maturity operated to end and determine the policy. Citing *Knickerbocker Life Ins. Co. v. Pendleton*, 112 U. S. 696, 5 Sup. Ct. Rep. 314, 28 L. Ed. 866; *Iowa Life Ins. Co. v. Lewis*, 187 U. S. 335, 23 Sup. Ct. Rep. 126, 47 L. Ed. 204; *Fidelity Mutual Life v. Price*, 117 Ky. 25, 77 S. W. Rep. 384; *Ressler v. Fidelity Mutual Life*, 110 Tenn. 411, 75 S. W. Rep. 735."

BILLS AND NOTES—EVIDENCE.—That the plaintiff in an action upon a negotiable promissory note by introducing in evidence the note and indorsement of the payee thereon in blank prima facie establishes his case is held in *Gillespie v. First National Bank (Ok.)*, 95 Pac. Rep. 220.

Plaintiff introduced the note sued on in evidence with indorsement and rested his case. Defendant offered evidence to support the allegations of answer to which plaintiff demurred and the court instructed the jury to return a verdict for plaintiff. Defendant appealed. The Supreme Court in affirming the judgment, comments as follows:

"The note sued upon was a negotiable instrument. The production in evidence of the note indorsed in blank prima facie established its case. 1 *Daniel on Negotiable Instruments*, par. 812; 8 *Cyc.* 229; *Winfield Bank v. Bettie McWilliams*, 9 Okl. 493, 60 Pac. Rep. 229; *Seymour Price v. Winnebago National Bank*, 14 Okl. 268, 79 Pac. Rep. 105. The evidence of defendants establishes that the consideration for which the note was executed by them was substantially as set forth in their answer, but there was neither any allegation by them in their answer nor any proof that plaintiff had notice of such facts before it became the owner of the note, or notice that such consideration had failed in whole or in part. There is no allegation or proof of mala fides of plaintiff. There is no evidence that the execution of the note by defendants was illegally or fraudulently obtained, but the

evidence is to the effect that Kelly, the payee in the note, refused to carry out his contract. Proof by defendants that the note was executed without consideration by them, or that the consideration, originally valid, had subsequently failed, was not sufficient to shift the burden of proof upon the plaintiff to show that it was a bona fide holder for value. 1 *Daniel on Negotiable Instruments*, par. 814."

LIEN FOR ATTORNEYS' FEES—ENFORCEMENT—SETTLEMENT BY CLIENT.—In *Barthell v. Chicago, M. & St. P. Ry. Co. (Iowa)*, 116 N. W. Rep. 813, it was held under the statute of that state giving an attorney a lien on his client's right of action for his fees that where a plaintiff in an action for damages contracted to give his attorneys for their services, 50 per cent of the amount received from the defendant, and the original notice in the action gave notice of an attorney's lien therefor, but defendant settled with plaintiff for \$300 and the attorneys suit was for \$150, under the lien, proof of the validity of their client's claim was not essential to recover. To that extent the court would seem to have held for the purposes of the attorney's claim, the defendant had admitted the validity of the claim of plaintiff to the amount settled for. On this point the court says:

"Lastly, it is argued that plaintiffs must prove that Barger had a valid claim against the company; that this they did not do, and consequently they must fail. This proposition we have also decided adversely to defendant's contention. *Smith v. Railroad*, 56 Iowa, 720, 10 N. W. Rep. 244; *Parsons v. Hawley*, 92 Iowa, 175, 60 N. W. Rep. 520; *Larned v. Dubuque*, 86 Iowa, 166, 53 N. W. Rep. 105. Practically every proposition relied upon by appellant has been determined adversely to its contention by previous decisions of this court. Some of these cases may run counter to the weight of authority, but as they have stood for many years without action by the Legislature, we are not disposed to overrule them at this time."

The argument was made that the contract in question was void for champerty. The court says there is no merit in this contention. See *Boardman v. Thompson*, 25 Iowa, 487; *Jeffries v. Ins. Co.*, 110 U. S. 305, 4 Sup. Ct. Rep. 8, 28 L. Ed. 156; *Dunne v. Herrick*, 37 Ill. App. 180; *Kusterer v. Beaver Dam*, 56 Wis. 471, 14 N. W. Rep. 617, 43 Am. Rep. 725; *Ryan v. Martin*, 16 Wis. 57. It was contended that the contract gave the attorneys the right to settle the claim to the exclusion of plaintiff's right to settle. But the court held

that there was nothing in the contract which deprived the plaintiff of his right to settle.

In a number of the states, statutes have been enacted similar to the one in question giving to the attorney a lien and while these enactments have been strenuously assailed on the grounds that they were unconstitutional, contrary to public policy, etc., they have generally been upheld.

LIABILITIES OF HEIRS AND ESTATE OF CO-SURETIES FOR BREACH OF BOND.

The extent and duration of the liabilities of co-sureties on a bond for the faithful performance of the duties of their principal are not realized by those who become such sureties.

The sureties bind not only themselves, but their heirs, executors, administrators and assigns, and the duration of the liability often extends far beyond the ordinary statute of limitations of the State in which the co-surety resides.

The co-surety who is compelled to respond in damages upon the breach of the bond which occurs after the death of the co-sureties can recover from the executor or the administrator of the deceased co-surety; he can also recover from the heirs of the deceased co-surety who received property from the estate. The statutes of limitation do not run against him and in favor of the co-surety until he has actually paid the damages.

Upon the question as to the right to recover from his co-sureties for the breach occurring after the death of his co-surety, the law is settled and is as follows:

Brandt on Suretyship and Guaranty,¹ says: If two co-sureties become bound in a joint, or joint and several obligation, and one of them dies, and the other before or after such death, pays the debt, he can recover contribution from the estate of such deceased co-surety, either at law or in equity, to the same extent as if such

co-surety was alive. As between co-sureties there is an implied agreement for contribution at the time they sign, and this implied agreement is not joint, but several. It is like any other promise to pay money for which the personal representative of the deceased promiser is liable; and it makes no difference whether the default was committed before or after the death of the promiser." This statement of the law is abundantly verified by the cases cited in its support.

In *Hetch v. Wever*,² Justice Deady states the law to be as follows: "On a careful examination of the authorities, I have concluded that whenever the undertaking of the surety is for a definite period, as for the conduct of an officer during his term of office, or for the repayment of advance made to the principal in the bond until notice is given the obligee that the liability is terminated, the estate of the surety in the hands of the administrator is answerable for any default of the principal occurring after his death, and this is especially so where, as in this case, the surety bound himself, his 'heirs, executors and administrators' for the performance of his undertaking."³

In *Conover v. Hill*,⁴ the law is stated to be as follows: "Where one of the sureties upon the bond of the school commissioner, which was joint and several, dies, and after his death the surviving surety was compelled to pay for the default of the principal, the survivor had the right to compel a contribution from the estate of the deceased co-surety."

The first point has already been decided

(2) 34 Fed. Rep. 111.

(3) 27 Am. & Eng. Ency., 2d Ed., page 456, is practically identical with the above, and other cases are cited as follows. *Ins. Co. v. Davies*, 40 Iowa 469; *Green v. Young*, 8 Grenl. 14; *Knotts v. Butler*, 10 Rich. Eq. 143; *Moore v. Wallis*, 18 Ala. 458; *Hightower v. Moore*, 46 Ala. 387; *Mowbray v. State*, 88 Ind. 327. The opinion of Judge Deady is cited, with approval in the case of *Pond v. U. S.*, decided in the Circuit Court of Appeals, 9th circuit, reported in Vol. 111, Fed. Rep. 989.

(4) 76 Ill. 342.

(1) Sec. 248.

in favor of the claim of McAllister in *McAllister v. Irwin*,⁵ in which the court says: "Counsel for defendant in error contend that no claim can be allowed against the estate, arising out of the obligation of the deceased as co-surety, until a court of equity had determined the amount due from the estate, and then only for one-third of the amount paid by plaintiff in error, unless it be established that the other surety, Morgan H. Williams, is insolvent. The county court is vested with authority to hear and determine claims against the estate of deceased persons. The one of several sureties on an obligation who discharges the debt may enforce contribution from the estate of a deceased co-surety."⁶

In the case of *Snyder v. State*,⁷ the law is decided to be that the estate of the deceased co-surety is liable upon an official bond for any misapplication of funds, by the officer, occurring after the surety's death.⁸

(5) 31 Colo. P. 254.

(6) *McKenna v. George*, 2 Rich. Eq., S. C., 15. "It does not appear that Morgan Williams, one of the sureties on the bond, is insolvent, or that any attempt has been made to force contribution from him. The one of several sureties discharging an obligation may enforce contribution from his co-sureties so as to equalize the loss. He can recover from each of his co-sureties only the aliquot part of the whole amount paid, calculated upon the basis of the number of sureties, unless it appear that some of them are insolvent, in which event he may recover from each of the solvent ones the moiety of the whole debt, having regard only to the number solvent." *Hills v. Hyde*, 19 Vt. 59; 46 Am. Dec. 177; *Henderson v. McDuffee*, 5 N. H. 38, 30 Am. Dec. 557.

(7) 40 Pac. Rep. (Wyo.) 441, 63 Am. St. Rep. 60.

(8) In the annotations of this case the law is stated to be as follows: "A contract of suretyship is not terminated by the death of the surety. *Notes to Chamberlain v. Dunlap*, 22 Am. St. Rep. 814; *Commonwealth v. Stub*, 51 Am. Dec. 524. And his estate is liable for a breach of the principal's obligation occurring after the surety's death. *Royal Ins. Co. v. Davies*, 40 Iowa, 469, 20 Am. Rep. 581. One who obligates himself that another will faithfully perform the duties of an office is liable upon the default in the performance of those duties, although such default take place after the death of such surety. *Green v. Young*, 8 Green, 1, 14, 22 Am. Dec. 218; *Susong v. Valden*, 10 S. C. 247, 30 Am. Rep. 50. The estate of the deceased surety on a bond given by an insurance agent for faithful conduct and accounting is liable for moneys coming into the agent's hands

* Upon the second proposition that the co-surety who is compelled to pay for a breach of the bond occurring after the death of the co-surety whose estate has been settled, a number of cases cited under the first proposition also determine the liabilities of the heirs. In addition we refer to the case of *Hecht v. Skaggs*,⁹ which was a suit on the administrator's bond where the co-surety died after the death of the surety, the court says: "The surety court bind his legal representatives, and by the terms of the contract under consideration, did so."¹⁰ And the appellant, having paid on account of a breach of the conditions of the bond, various sums, * * * and the principal in the bond as well as his co-surety being insolvent, is entitled to contribution against the estate of Russell, his co-surety in one-half those sums, with interest from the dates they were paid at six per cent per annum. The estate of Russell was fully administered before the liability was fixed or the money paid, and lands exceeding in value the amount claimed for contribution passed to the appellee in his will. The appellant is therefore entitled to a judgment against appellee for the amount claimed as above, to be charged as a lien on the lands devised."

In the *American Law of Administration*,¹¹ the law is stated as follows: "The general remedy of a creditor, whose right of action accrued after the time in which claims may be presented against the estate while under administration, is by bill in equity against the recipients of property from a solvent estate, for contribution to the extent of the estate received by them; yet, while in some of the states an

after the surety's death, *Rapp v. Phoenix Ins. Co.*, 55 Am. Rep. 427. The estate of a deceased surety upon a guardian's bond, joint and several in form, remains liable after his death. *Douglas v. Ferris*, 138 N. Y. 192, 34 Am. St. Rep. 435. Compare *Shackamaxon Bank v. Yard*, 150 Pa. St. 351, 30 Am. St. Rep. 807."

(9) 53 Ark. 291, 13 S. W. Rep. 930, 22 Am. St. Rep. 192.

(10) Citing numerous authorities.

(11) 2 Woerner, 2d Ed.

action at law is expressly denied, the heirs are held liable in others, at law; and in such case there is no recourse to equity.

In New York it was held by a federal court that at common law the heir of an heir is liable, to the extent of the real estate received, for the specialty debt of the ancestor, and that this liability can be enforced in equity."¹²

Upon the last point as to when the statute of limitations began to run against a surety the law is clearly set forth in *Brands on Suretyship and Guaranty*,¹³ where the author says:

"The statute of limitations begins to run between co-sureties at the time the debt is paid, irrespective of the time when the obligation was entered into or became due. The surety who has paid more than his share of the debt, may for every separate payment he makes, sue his co-surety for contribution, and the statute of limitations runs against each payment from the time it is made. Where suit is commenced against one of the two co-sureties before the debt is barred by the statute of limitations, and judgment is recovered against him, and the debt paid by him after the time when the statute would have been a bar if no suit had been previously brought, and after the debt is barred by the statute against the co-surety, the statute begins to run between the sureties from the time of payment, and the surety who pays may recover contribution from his co-surety at any time after such payment and within the statutory limitations."

In *Pleasant v. Samuels*,¹⁴ which was a case of surety against the co-surety for indemnity upon promissory notes against which the statute of limitations had run

to the payee, the court says: "In the case at bar, the action is not brought upon the promissory notes to recover against the maker upon the promises which he had made in such notes. The cause of action rests upon the fact that the plaintiff was compelled to take up and pay, and did take up and pay, notes which he had made for the accommodation of the defendant. The case of action arises at the time when the plaintiff made such payments of money for the benefit of the defendant." This case is cited with approval in the case of *Lowenthal v. Coonan*,¹⁵ in this case the court cites, in support of this proposition, *Wood's Statute of Limitations*, 321; *Jones on Mort. and Par.* 1213. *Brandt on Suretyship*, Sec. 199; 28 *Am. & Eng. Ency. of Law*, 794; *Yule v. Bishop*, 133 *Calif.* 574, 65 *Pac. Rep.* 1094. In the annotations of this case, the law is stated as follows:

"The statute of limitations begins to run against the right of the surety to demand contribution from his co-surety as soon as payment is made by him."

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(15) 135 *Calif.* 381, 67 *Pac. Rep.* 324, 87 *Am. State Reports*, 115. In this case the court cites, in support of this proposition, *Wood's Statute of Limitations*, 321; *Jones on Mort.*, 1213; *Brandt on Suretyship*, sec. 199; 28 *Am. & Eng. Ency. of Law*, 794; *Yule v. Bishop*, 133 *Calif.* 574, 65 *Pac. Rep.* 1094. In the annotations of this case the law is stated as follows: "The statute of limitations begins to run against the right of the surety to demand contribution from his co-surety as soon as payment is made by him."

VENDOR AND PURCHASER—CONSIDERATION.

TARNOW v. CARMICHAEL.

Supreme Court of Nebraska, June 4, 1908.

A grantee, in an executory contract for the sale and purchase of real estate, refused upon the maturity of the contract to perform it, unless the grantor promised to procure for him the outstanding title of remaindermen in an entirely separate tract of land, and the grantor made such promise. Held, that the same was without consideration and unenforceable.

(12) *Booth v. Starr*, 5 *Day*, 419, 436. See also *Marshall, C. J.*, in *Riddle v. Mandeville*, 5 *Cranch*, 322, 330; *Gordon v. Gilfill*, 94 *U. S.* 168; *Chewett v. Moren*, 17 *Fed. Rep.* 820; *Gillispie v. Hauenstein*, 72 *Miss.* 838; *Hendricks v. See*, 32 *Ark.* 714; *Rex v. Creel*, 22 *West. Vt.* 373, 380; *Hawley v. Botsford*, 27 *Conn.* 80, 83; *Mutual Life Ins. Co. v. Hopper*, 48 *N. J. Eq.* 387; *Pyatt v. Waldo*, 85 *Fed. Rep.* 399, 340.

(13) *Sec.* 259.

(14) 114 *Calif.* 34, 45 *Pac. Rep.* 998.

The owner of a life estate in certain land claimed to own the fee title, and asked the court to quiet the same against the claims of remaindermen, who, in turn, prayed for a decree establishing their title. Held that, the title of the remaindermen being established, they were entitled to a decree as prayed.

Equity will devise a remedy to meet emergencies, and will adjust the property interests of litigants whenever it can do so without prejudice to the legal or equitable rights of any person.

The doctrine of caveat emptor should be invoked whenever necessary that one may not be deprived of his rights; but it will not be applied to assist one in getting or keeping what he is not entitled to.

Equity will permit the beneficiary of a trust fund to pursue the same and enforce his rights against it wherever it may be identified, and the conversion of the trust funds into land and the land into money will not prevent the enforcement of such rights.

EPPELSON, C.: December 24, 1894, Ellert O. Franzen died intestate, leaving seven children and his widow, Tomke M. Franzen, now by marriage Mrs. Tarnow, the plaintiff in this suit. Deceased owned at the time of his death 124 acres of land in section 33, and 160 acres in section 34, township 2, range 4, in Jefferson county, Neb. All of said land was incumbered by a mortgage of about \$3,200. He and his family occupied the land in section 34 as their homestead. Decedent's estate was administered in the county court of Jefferson county, and an administrator appointed, who in November, 1895, filed in the district court a petition for a license to sell the real estate of said deceased for the payment of indebtedness allowed by the county court against the estate, and for the payment of the mortgage liens against the land. A hearing was had upon the administrator's petition, which resulted in the granting of a license to him, authorizing him to sell all of the land of the deceased to pay the general debts allowed against the estate, amounting to \$3,394, and the costs and expense thereof, amounting to \$300. Said license specifically provided that the sale should be made "subject to all liens and incumbrances existing at the time of the death of the deceased and subject to the homestead interest in said lands of Tomke M. Franzen to the amount of two thousand dollars." With this license as his authority, the administrator proceeded to advertise and sell the land. The notice of sale recited that the real estate described would be sold "in pursuance of an order of C. B. Letton, one of the judges of the district court of Jefferson county. * * *" The administrator's return to the court showed that he sold the 160-acre tract to Carmichael for \$4,000 and the 124-acre tract to the widow, plaintiff herein, for \$3,100. The return made

by the administrator to the court did not show that he had attempted to sell the homestead interest. On the contrary, he reported that the sale was made "in pursuance of the license granted on the 16th day of February, 1896." The sale thus reported to the court was affirmed April 14, 1896. On February 17th, one day later than the granting of the license, the plaintiff herein filed in that proceeding a showing, in the form of an affidavit, in which she said that she was the widow of said deceased and the mother of his children naming them, five of whom were minors at that time. She set forth the homestead character of the land in section 34. She further alleged that it was to the best interest of the creditors that all of the land belonging to the estate should be sold and disposed of; that, by selling it all, it would bring more money than it would if divided and the homestead set out. She asked the court to order all of said real estate sold, and that out of the proceeds thereof, after the mortgage indebtedness upon said land should be paid, that she be allowed \$2,000 in lieu of her homestead rights. This application was supported by a number of affidavits of disinterested witnesses, to the effect that it would be to the best interest of the estate to sell the land as an entirety. It is possible that these affidavits were presented to the court prior to the granting of the license. If so, it is apparent that the request therein made was not granted. The administrator, misapprehending the authority given to him in the license, and believing that he had authority to sell the land free from mortgage liens and the homestead exemption, undertook to sell and convey the same in its entirety. The evidence discloses that the purchase price paid by each purchaser was the value of the respective tracts of land. Perhaps the administrator was misled by reason of the filing by the plaintiff herein of the affidavits and showing above described. The plaintiff herself and Carmichael were also laboring under the same mistake. After confirmation, although no order was made by the court impressing the homestead character upon the \$2,000 of the purchase price paid by Carmichael, the administrator paid that sum to the plaintiff herein, and she accepted the same in lieu of the homestead. She, in turn, repaid it to the administrator as a part of the purchase price of the 124-acre tract in section 33. Carmichael thought he was buying the land free from all liens and incumbrances. He paid its full value. The administrator attempted to convey such title. The plaintiff herein considered that the homestead interest passed to Carmichael by the administrator's deed.

About two years after the administrator's sale, plaintiff was desirous of disposing of the land she had purchased in section 33, and on August 15, 1898, plaintiff and Carmichael entered into a written contract, by the terms of which plaintiff agreed to sell, and Carmichael agreed to purchase, the 124 acres for the expressed consideration of \$3,700, \$300 payable in cash, \$2,300 on March 1, 1899, Carmichael assuming an \$1,100 mortgage given by plaintiff, then an incumbrance upon the land, and upon performance of the written contract on March 1, 1899, plaintiff was to convey said land to Carmichael by good and sufficient warranty deed. However, before the maturity of the contract, Carmichael became apprehensive that his title to the land in section 34 and plaintiff's title to the land in 33 were defective because of the homestead interest of the children of Ellert O. Franzen, deceased. He refused to fulfill his contract for the purchase of the 124 acres. The parties then had further dealings, described in Carmichael's testimony as follows: "A day or two before the first of March (1899) we came over to straighten the thing up. * * * I told her I wouldn't go ahead and take the land without she would make some provision to make the deed all right. I wasn't quite satisfied with the title. * * * She objected at the time, and thought it was all right. I proposed to let the trade fall through. * * * She didn't want to do that. * * * I made the proposal I would take the land on them conditions if she would take a mortgage of \$2,000 until she furnished a quitclaim deed, and to put it in the mortgage that she would give a quitclaim deed from all the heirs, and I would take the land. * * * She objected to that, but on the 23d of March she said she had made up her mind to fix it up that way." Thereupon Carmichael took the deed to the land in No. 33, gave plaintiff the additional \$300 provided for in the contract, and executed and delivered to plaintiff his promissory note for \$2,000 due in six years, and gave a mortgage on the land in section 33 to secure its payment, and assumed the \$1,100 mortgage. The following stipulation appears in the mortgage securing the \$2,000 note: "This mortgage is given as a part of the purchase money of this land, and it is expressly understood and agreed that before the principal is to be paid that the said Tomke M. Tarnow is to furnish a quitclaim deed from all the heirs at law of E. O. Franzen, now deceased, conveying the land above described and also the west half of the southwest quarter of section thirty-four (34), town number two (2), range number four (4) Jefferson county, Nebraska." Substantially the same indorsement was made upon the

note secured by the mortgage. Thereupon Carmichael took possession of the land and paid interest upon the mortgage indebtedness at 6 per cent per annum for six years. Upon maturity of the \$2,000 note, plaintiff demanded payment, which was refused by Carmichael because plaintiff had failed to procure the quitclaim deed from the Franzen heirs as agreed, and plaintiff brought this action to foreclose her mortgage. In an amended petition plaintiff set forth the facts as above shown, and alleged, further, that she received no consideration for executing the stipulation incorporated in the mortgage and indorsed on the back of the \$2,000 note in which she agreed to procure a quitclaim deed from the heirs of the estate in controversy. Upon request of Carmichael the heirs were made parties to the action, and each filed a cross-petition, alleging ownership of an undivided one-seventh interest in remainder in the land occupied by their father as a homestead. The prayer of each cross-petition is to effect that the court adjudge that each is the owner of a one-seventh interest in remainder, and for general relief. Carmichael answered, requesting the court to determine to whom the \$2,000 remaining due on the note and mortgage belongs, and that it may be paid accordingly, and prayed that his title to all the land be confirmed and quieted against the claims of all other parties to the action. The district court found that there was no consideration for the promise made by plaintiff to furnish such quitclaim deed, and adjudged that the heirs are not now entitled to the relief prayed for in their answers and cross-petitions, but inquired no further into the equities of the parties, and denied all relief to Carmichael, and decreed a foreclosure of the mortgage for the full amount thereof. Carmichael appealed from the decree of foreclosure and the heirs appeal from the order dismissing their cross-petitions.

It may be well to say at this time that, in view of the record had in the proceedings instituted by the administrator and of the other evidence in this case relative to the value of the land, the homestead interest was not sold by the administrator. The doctrine of caveat emptor applies to Carmichael. He was bound to take notice of the license and of the authority of the administrator and the power of the court. The evidence discloses that the land was capable of division, and that the homestead could have been appraised and set out by metes and bounds. The title, therefore, of the Franzen heirs in remainder, has never been disturbed by any proceedings had. They are the owners, and have been at all times, of the homestead of their father, subject to

the life estate of their mother, the plaintiff herein. But it cannot be said that the plaintiff is now the owner of the life estate. She joined with the administrator in asking for the sale of all the land, and accepted a part of the purchase price thereof in lieu of her life estate. She is estopped from now claiming such title or interest in the land. That interest has been sold and conveyed to Carmichael. It is argued by Carmichael that in the event the homestead title cannot be impressed upon the \$2,000, for which he gave his note and mortgage, he should not be required to pay the same until quitclaim deeds from the Franzen heirs are procured by the plaintiff, as stipulated. Plaintiff contends that her agreement to secure quitclaim deeds from the Franzen heirs to the land in 34 cannot be enforced, for the reason that there was no consideration given for such promise, as Carmichael was bound by contract to pay her this \$2,000 on March 1, 1899. If we would resolve this question against her, the case could easily be disposed of. A discussion of this question is unnecessary. We have given it careful attention, and have concluded that such promise was without consideration. See *Esterly Harvesting Machine Co. v. Pringle*, 41 Neb. 265, 59 N. W. Rep. 804; *Allen v. Plasmeyer*, 3 Neb. (Unof.) 187, 90 N. W. Rep. 1125; 9 Cyc. 349; *McCarty v. Hampton Bldg. Ass'n*, 61 Iowa, 287, 16 N. W. Rep. 114; *King v. Duluth, M. & N. R. Co.*, 61 Minn. 482, 63 N. W. Rep. 1105; *Abbott v. Doane*, 163 Mass. 433, 40 N. E. Rep. 197, 34 L. R. A. 39, 47 Am. St. Rep. 465, and note. Whatever rights plaintiff had to the \$2,000 fund represented by the mortgage remained unchanged by reason of her promise to secure quitclaim deeds.

There are broad principles of equity which call for recognition, and which must control the disposition of this case. At the time of the administrator's sale, when the plaintiff by her conduct sold her interest in the homestead to Carmichael, or, in other words, barred herself from asserting title therein against him, she was entitled to receive the value of her interest at that time. She was entitled to the then value of the use of the homestead during her life. Whatever was hers, she received, but she received more. The excess did not belong to her. It was paid to her by mistake. It became a trust fund in her hands. Equity will so regard it, and will follow it so far it may be identified.

It is argued that the doctrine of caveat emptor bars Carmichael from asserting any right to the fund in controversy. Indeed, purchasers at judicial sales buy at their risk, and to them the doctrine of caveat emptor

applies, and they cannot take title as against parties not in court, or against those whose interests are not disposed of in the proceeding in which the judicial sale is made. We have applied this doctrine as against Carmichael and in favor of the Franzen heirs because the court in the proceedings instituted by the administrator did not attempt to dispose of their interests, and had no power to do so; but can it be said in justice and equity that this court will enforce the doctrine of caveat emptor as against Carmichael and in favor of the widow to the extent that we will permit her to retain the money she was not entitled to which was paid to her through mistake, and that mistake occasioned partially through her conduct? The doctrine of caveat emptor does not prevent a purchaser at a judicial sale from enforcing whatever legal or equitable rights may be preserved to him. He is not the victim of every unfortunate contingency which may arise in a proceeding. The doctrine should be invoked that one may not be deprived of his rights, nor to assist one in getting or keeping what he is not entitled to. His rights to this money Carmichael could have enforced at any time. Had the mistake been discovered prior to the confirmation of the administrator's sale, no doubt would exist but that the court could have given relief. It could have been reached while it was in the land which was purchased in part by the fund. It could have been identified after the making of the executory contract for the sale of the land purchased with it, and before the giving of the mortgage, which the plaintiff now seeks to foreclose. Equity will not allow the conversion of land into money or money into land to stand in the way of doing justice. Good conscience demands that a court of equity recognize the rights of all the parties and adjust them when it may be done without prejudice to any one. This court will not falter or hesitate upon mere technical grounds of procedure, when by so doing gross injustice would be done. With all the parties now before us, there can be no doubt but that we can correct and place in order the respective rights of the parties, which otherwise would result in gross injustice to some of them. That justice may prevail, a court of equity will devise a remedy to meet every new emergency, and will enforce the restitution of property when it has jurisdiction of the same. It is for such emergencies that courts of equity exist, and whenever a decree can thus be made upon the record of a case presented, although no precedent may be found, the court will so proceed. But the enforcement of the rights to a trust fund, wherever the

same may be identified, is doing no violence to equity jurisprudence. The idea is not a new one. Pomeroy's Equity Jurisprudence (3d Ed.) 1175 et seq. Carmichael's money was converted into land. That land was sold and the trust fund transformed into a note and mortgage signed by the identical person who paid it by mistake. He is entitled to follow it and obtain that which in equity and good conscience belongs to him. Plaintiff, the holder of the trust fund, sought to foreclose the mortgage for the full amount thereof, which would operate to convert the trust fund into money in her hands. She is entitled to only a part of it. Her interest must be determined by taking into consideration the value of her life estate in the Franzen homestead as it existed when Carmichael bought it. The mortgagor is the beneficiary of the trust because he paid the fund through mistake for a title which he never acquired. He is entitled to reimbursement, and to have deducted from the mortgage the amount he paid for the title of the heirs which he did not acquire. He is entitled to interest upon that amount from the time he paid it, as the plaintiff has withheld it from him and she had the use of it. From the evidence before us we cannot make a computation, as we are unable to determine what was plaintiff's expectancy of life at that time. Additional evidence must be given that a computation may be made by the district court. Plaintiff is entitled to a lien upon the land in section 33 for the amount thus found due. We conclude, also, that the computation be made upon a 6 per cent basis as a just and fair rate, and this is suggested by the parties, in that they agreed upon that rate in the mortgage. Carmichael has been rightfully in the possession of the property by the purchase of her life estate, and therefore need not account for its use. It has been suggested that Carmichael might be entitled to subrogation to the \$3,300 mortgage which was upon all of the Franzen land at the time of the administrator's sale, inasmuch as his money was used for the satisfaction of the mortgage. We cannot see wherein he is entitled to subrogation, or wherein it would avail him. As he is not required to account for the rents and profits during his occupancy of the land in controversy, he has received all the benefits which he would be entitled to receive if it were possible for the court now to decree him subrogated to the lien of the mortgage.

It is contended by the plaintiff that in the general distribution of her husband's estate she has received less than she was entitled to, taking into consideration the dower interest which the law would have given her, and which

she claims she has never received. We consider it unnecessary to discuss this question at length. The following facts, however, stand out prominently in the record against her contention. By joining with her husband in the mortgages upon the land, she waived her dower interest therein to the extent of the mortgages. Considering the land worth \$7,100, and deducting therefrom the amount paid in satisfaction of the mortgage and the value of the homestead, we find a surplus of but \$1,761. Her dower interest at the time of the sale was not of very great value. And, again, in this connection we mention the fact that she, as the widow of Franzen, made application to the court to have the land sold in its entirety, and therefore she should have looked to the proceeds of the sale for the satisfaction of her dower. The Franzen heirs were not estopped from alleging their title to the homestead of their father by their failure to object to the confirmation of the administrator's sale. No record made in that proceeding challenged their attention to the attempted conveyance of the homestead by the administrator, and the court being without power to sell the homestead, and the heirs receiving no consideration for their interest therein, they are not barred by the decree of confirmation nor by their own conduct from asserting the title they inherited. The district court should have affirmed their title to the homestead.

We therefore recommend that the judgment of the lower court be reversed, and this cause remanded to the district court, with instructions to enter a decree quieting the title of the Franzen heirs as remaindermen in and to the homestead of their father, and, further, that an accounting be had of the amount due to the plaintiff according to our findings and suggestions.

DUFFIE and GOOD, CC., concur.

PER CURIAM. For the reasons given above, the judgment of the district court is reversed, and this cause is remanded to the district court, with instructions to proceed further in the matter as recommended in the opinion.

Note—Equity Suffers No Right to be Without a Remedy.—Oftentimes the cases coming up for equitable relief are complicated by the nature and extent of the transaction under inquiry, the conflicting interests of the parties, the effect of the conduct of the parties upon their rights, and many other factions. Equity undertakes, however, to provide a remedy to meet emergencies, and the fact that the relief sought is unusual, or even unprecedented, will not defeat one's right to equitable relief if those factors are present which are necessary to confer equitable jurisdiction. *Rhoton v. Baker*, 104 Ill. App. 653; *Toledo, etc. R. Co. v. Penn-*

sylvania Co., 54 Fed. Rep. 746; *Sturdivant v. Reece*, 3 Ark. 278. Equity looks at the substance, and will disregard names and penetrate disguises of form, to discover and deal with it, *Stockton v. Central R. Co.* (N. J. Ch.) 50 N. J. Eq. 52, 24 Atl. Rep. 964. Equity cannot be invoked to inflict injury or damage on defendant, where no substantial right would be secured to plaintiff, *Mahler v. Brumder*, 92 Wis. 477.

In *Baltimore Trust & G. Co. v. Hambleton*, 84 Md. 456, the facts of which were quite unusual, the rule was sustained that equity will devise a remedy to meet each new emergency.

It may, as in the principal case, be required that money be refunded, as a condition of the relief sought (*Galbraith v. Tracy*, 153 Ill. 54), or as it is put, that the plaintiff must do equity, *Barrier v. Kelley*, 82 Miss. 233.

In the principal case there occurs a conversion. No matter what changes in form or character the property may assume, so long as it can be followed, equity will attach.

Cases of this kind are among the most interesting and important that courts have to deal with. The court would seem to have taken hold of the controlling facts of the case and to have applied thereto sound principles of equity.

JETSAM AND FLOTSAM.

LEGAL ETHICS—ANSWERING LEGAL QUESTIONS IN NEWSPAPERS.

The propriety of members of the bar answering legal questions in newspapers has been a matter of discussion in England, and was recently dealt with in a report to the Bar Council. The professional practice committee had reached the conclusion that work of this kind by a member of the bar in consideration of ordinary literary remuneration constitutes a breach of professional etiquette. But the council has decided, by a majority of 21 votes against 15, that it does not constitute an offense against professional decorum, "provided the name of the barrister giving the answer is not disclosed to the public, nor directly nor indirectly brought to the knowledge of the person asking the question." In view of the divergence of opinion in the council, the question has been left for discussion at the annual meeting of the bar. The Law Journal hopes that the moderate view of the majority of the council will prevail, and says: "The dignity of the profession is not likely to be enhanced by the imposition upon its members of unnecessary restrictions that savor of the arbitrariness of trade unionism."—Case and Comment.

AMERICAN STATESMEN IN SWITZERLAND.

At noon at the large annual banquet given by Americans at the Schweizerhof, Lucerne, to celebrate the anniversary of the Independence of the United States, Mr. Louis Lombard of Treviso Castle and New York City, who presided, spoke as follows:

Ladies and Gentlemen: The first thought on this Fourth of July is one of sadness. We all must feel a personal loss in the death of a former President. Let us take this occasion to reverently salute the memory of Grover Cleve-

land, and to extend our profoundest sympathy to his family. May statesmen be oftener made of the honest, strong fiber that characterized him.

Comparing many of the legislators of our day to the geniuses who guided the steps of our baby republic 132 years ago, one is forced to conclude civic virtue is growing in inverse ratio to the growth of our population. To "get there" and to "stay there" seems to be the predominating motive of many of our "public servants."

On this particular Fourth of July, 1908, it may not be inappropriate to use the prerogative of toastmaster to toast some of our modern legislators. To toast, however, does not always mean to drink to one's health—it may signify to brown by fire, in other words, to "roast."

One evening, at the Waldorf, I asked Senator Jones of Nevada, just back from Europe, his impression of the Old World. "My boy," said he, "there are but two classes of people over there: the Kiss Mes and the Kick Mes."

In America it is notorious we are all equal—some a little more equal than others, especially our private servants and our legislators, sometimes innocently called public servants.

The majority of our law-makers might be divided into two kinds: one—the honest, silly reformer whom we in America call "crank," the fellow who would bring wealth and joy to the million, though himself unable to produce or save enough food for his own consumption; and the other—the larger prototype, who simply goes into politics "for what there's in it."

Some brainy and well balanced patriots enter public life with the single resolve to do good. Such, however, are so rare they hardly count in the legion of law-tinkers whose main stock in trade is often but the ability to pronounce with inborn persuasiveness the spiritual, I mean spirituous, shibboleth of ward politics: "Boys, what'll you have?"

Intellectual, unselfish, fearless politicians are at times misunderstood and oftener positively disliked on account of their integrity. In sheer despair, some retire disgusted with politics, more become opportunists, believing a half-measure better than none, and a considerable number are simply forced out by soulless machines.

The numberless unbaked lawyers who, under the title of law-makers, thrive upon easy constituencies, make the locusts' plague of old seem a joke, if we compare that ancient evil to the harm done by the partisan statutes our dillettanti solons enact to thwart economic laws.

And yet, with all its legislative snags, I am very hopeful of our country's future. In spite of our myriad canary-skulled and calloped-lunged demagogues, who, since the first Fourth, have threatened our government, the nation remains exceedingly healthy. One must admit it has a strong Constitution.

The unhampered inventiveness of our people and the resources of our land could ultimately make us the owners of the earth provided . . . the proposition I am about to lay upon the desk, I beg pardon, upon the table, of this Congress, should be acted upon. I had intended to keep dark this scheme of mine, as its publication might some day block my appointment as Vice Deputy Consular Agent to the South Pole or even lower down, but this being a crowd patriotic and friendly, I shall entrust it my panacea regardless of personal consequences. With so many representatives of the sex famed for

keeping secrets, I am sure my recipe will not be divulged to any man either dead or not alive. Here it is:

To make our country happier and wealthier, I move that our state and national legislatures adjourn 52 weeks each year!

I had thought of offering a toast to that legislative suicide, but the seriousness of our independence day suggests a loftier and more optimistic theme. I would propose we lift our glasses to our next President. I hope that I echo your sentiments in saying: Whatever be his party, may God guide him in what to do, and particularly in what not to do.

Ladies and gentlemen, let us drink to our next President!

THE STANDARD OIL REBATE CASE.

The following is the article by Judge R. M. Benjamin, of Bloomington, Ill., to which reference was made in our last editorial, to be read with it, lack of space preventing its appearance last week. The full force and effect of last week's editorial on the same subject will be more fully appreciated in connection therewith. This article appeared in the Bloomington, Ill., Pantagraph of July 25th, for a copy of which we are indebted to Judge Benjamin. We have the highest regard for his opinion, which is as follows.

"The United States circuit court of appeals in the opinion in this case, written by Judge Grosscup, state that the assignments of error that they review relate:

"1. The view adopted by the trial court, carried out in its rulings on the admission and exclusion of evidence, and embodied in its charge to the jury, that a shipper can be convicted of accepting a concession from the lawful published rate, even though it is not shown as bearing on the matter of intent that the shipper at the time of accepting such concession knew what the lawful published rate actually was.

"2. To the view adopted by the trial court that the number of offenses is the number of car loads of property transported, irrespective of whether each car load constituted the whole or a part only of a single transaction resulting in a shipment; and

"3. Whether, in the imposition of the fine named, the trial court abused the discretion vested in the court.

The attorneys who appeared in court for the Standard Oil company have given out a signed statement as follows:

"The circuit court of appeals has reversed the case upon three grounds:

"1. That a shipper cannot be convicted for accepting a concession from the lawful published rate, unless it is shown that such shipper actually knew what the lawful published rate was, and in accepting a less rate did so knowingly and intentionally.

"2. That the trial court erred in holding that the number of offenses is equivalent to the number of car loads of property transported.

"3. That the trial court abused its discretion by the investigation which it conducted after the verdict of the jury, and in measuring and exaggerating the penalty to be imposed by the ability of the Standard Oil Company of New Jersey, which was not the defendant or party to the suit, to pay the fine.

For the purpose of testing the validity of these rulings, let us consider a parallel liquor case. The sale of wine or beer in the absence of prohibitory statutes is just as legal as rebates or concessions to shipper in the absence

of the Elkins law. Rebates and concessions are penalized as crimes as well as the sale of intoxicating liquors to minors on the ground of public policy.

For illustration of the views of the court of appeals we assume the following state of facts: A Peoria distiller or brewer opens a saloon in Bloomington. A Bloomington man of good moral character, but worth less than \$100, obtains a license in his own name to run the saloon. A minor of the age of 20 years makes, on the first of the month, an agreement with the saloonkeeper for a daily drink of whiskey or beer, to be paid for at the rate of 10 cents a drink when he receives his wages at the end of the month. Under this agreement he gets thirty drinks during the month, and then settles for them paying \$3. At the next term of the circuit court the Bloomington saloonkeeper is indicted by the grand jury for selling intoxicating liquor, contrary to the statute, to a minor.

The indictment contains thirty counts—one for each drink. On the trial of the case a Peoria lawyer appears for the defendant and offers to prove that the saloonkeeper did not know that under the agreement for these drinks he was selling intoxicating liquor to a minor, but the court, in accordance with the rulings of the supreme court of this state, refuses to admit such evidence. (See 77 Ill., 322; 91 Ill., 494; 219 Ill., 16; see also 114 Fed. Rep. 632.)

The jury finds the defendant guilty on thirty counts of the indictment. In this state the fine for selling intoxicating liquors to a minor is not less than \$20 nor more than \$100 for each offense. The judge, in the exercise of his discretion, imposes fines (for instance, \$25 for each offense) amounting to \$750.

The case is taken to the supreme court of this state, and the attorney for the defendant (the Bloomington saloonkeeper) claims that the case should be reversed upon these three grounds:

1. That the saloonkeeper cannot be convicted for selling intoxicating liquor to a minor unless it is shown that he actually knew that the buyer was a minor.

2. That there was no offense committed until the minor had taken his thirty drinks—that each drink was a part only of a single transaction.

3. That the trial judge abused the discretion vested in the court by imposing fines amounting to a sum several times greater than what he was worth.

What would be the answer of the court to such claims? As to the first, the court would simply refer to the cases above cited. As to the second, the court would say that the transfer of each glass of liquor to the minor was a transfer of the title to the liquor when drunk—was a sale constituting a distinct offense. As to the third, the court would say that a man who commits a crime cannot escape the statutory penalty by merely showing that such penalty would "wipe out" all the property he had.

Now make the following substitutions: The Standard Oil Company of New Jersey and its lawyers in place of the Peoria distiller or brewer and his lawyer; the subsidiary Standard Oil Company organized in Indiana in place of the Bloomington saloonkeeper licensed by the city of Bloomington to sell intoxicating liquors; the transportation of car loads of oil under a general agreement for rebates or concessions in place of daily drinks to be settled for by a minor on pay day; violations of the Elkins law providing a penalty for rebate and concessions of from \$1,000 to to \$20,000 for each of-

fense in place of violations of our statutory law providing a penalty of from \$20 to \$100 for each sale of intoxicating liquor to a minor.

If the supreme court of Illinois would sustain the judgment in the supposed liquor case, as it certainly would, does it not seem that the same course of reasoning ought to have sustained the rulings of Judge Landis in the Standard Oil rebate case?"

CORRESPONDENCE.

STANDARD OIL DECISION.

Editor of the Central Law Journal:

Your editorial relating to the Standard Oil Rebate Case is O. K. and will go hence, to illustrate: Suppose a fire bug set out fires to destroy the American cities at the instigation of a hostile government as Russia. Of course, the latter could not and ought not to be indicted. Therefore any reference to that fact could not go into the mandatory record; and to mention it into the statutory record would be useless. So we see the talk about the record is wholly irrelevant and stamps the court with ignorance of record. If, after the verdict of guilty was in, if the judge reached out and got evidence to graduate his discretion by, this would not vitiate his judgment or the amount of his fine. If he found Russia was inciting incendiarism, then, of course, the fine imposed on the fire bug would be maximum and not minimum.

Evidence relating to Russia was not gathered to convict Russia, but only to inform the court which could lay on a minimum or a maximum fee as the judge saw fit. Now to say he was a fool and guilty of abuse of power is not juristic talk; only "immunity botch" plotters would talk such stuff or abuse the judge who acted properly in order to discharge his duty.

It is quite evident the court of appeals does not understand the proper use of records and their functions. At least they profess to be ignorant in order to abuse Judge Landis.

You are on the right track and lay it to them quite properly.

Yours very truly,

W. T. HUGHES.

Chicago, Ill.

BOOK REVIEWS.

AMERICAN STATE REPORTS, VOL. 118.

This volume contains cases on such important topics as Corporations, Book-Making and Pool-Selling, Homesteads, Bribery, Carriers, Ejectment; Liquor, Sale to Minor; Water Rights, Corporations de Facto, Right of Adopted Children to Inherit, False Imprisonment, Nuisances, Ne Exeat. There are, of course, many other important and interesting cases published in the volume. The cases are selected from the decisions of the highest courts of the various states. The case notes add to the value of the cases reported, and the law on any topic found in the volume will be found to be presented in a careful manner, and brought down to date. Published by Bancroft-Whitney Co., San Francisco.

HUMOR OF THE LAW.

In the early days of Sioux City the district court was presided over by a judge who, although a man of great ability, was given to rather free indulgence in ardent drinks. He was fond of sports of all kinds, and when a chance to witness a horse race happened to coincide with a sufficient number of drinks the judge's court was apt to be adjourned for the occasion. Once when he was holding court in an outlying part of the district word reached him of an unusually attractive event which was to come off in Sioux City, to see which he would have to start almost immediately. Hastily he announced: "The sheriff will adjourn court sine die."

Now, it chanced that there was a prisoner awaiting trial who had not been able to give bond, and as only two terms were held in a year the prospect of spending six months in jail was not at all pleasing to him. His counsel sprang to his feet and made an eloquent plea in behalf of his client. The judge listened thoughtfully, and after the lawyer was done speaking, fumbled through the docket till he found the case.

"State of Iowa against Bud Jones," he read. "What's this man charged with?"

The district attorney stated that the charge was burglary.

"Prisoner, stand up," said the judge. "You are charged with the crime of burglary, sir. What's your plea?"

"Not guilty," responded the prisoner.

"What's that?" said the judge, an expression of intense surprise coming over his face.

"Not guilty, your honor," repeated the prisoner.

"Well, that's a damn good plea," said the judge. "Prisoner discharged. Mr. Sheriff, adjourn court sine die."

And his honor lit out for the train.

"One seldom sees the typical old-time justice of the peace any more," remarked Judge Fred L. Taft the other day. "The 'Squire' of earlier times was a 'character,' and it's too bad in a way that the type has been supplanted."

"But," continued the judge, "even yet you'll strike a 'Squire' of the old school in the smaller towns. Only a few years ago I tried a case in another town before one of those old-time justices."

"The case was a rather trivial one, so far as the amount involved was concerned, but my client was anxious to win it, as a matter of principle. Some twenty or more witnesses had been subpoenaed on the other side, and all of them testified briefly. After they had got through I stated to the court that I had only three or four witnesses to put on the stand and that I thought we could finish up within a short time."

"Well," says he, briskly, picking up a dusty law book, "I'm sorry, sir, but I ain't got time to hear any testimony from your side. Court'll now adjourn and I'll give my decision at 4 o'clock."

"And," says Taft, "it never really occurred to him that he was showing any prejudice in the case."—American Legal News.

In a Southern town, where the attorneys had agreed among themselves to charge higher fees thereafter in divorce cases, an old colored woman, gossiping about the remarriage of her son,

who had recently been divorced, said: "Now dere is Katy Jones, right across de road, who's mighty anxious to marry, and she wants one powerful bad, but she'd better be in a hurry, case them divorces is gettin' kinder scarce and mighty high, and I've been told dat Jedge Nicholls says he ain't gwine to sell but a few more at dat price."—Case and Comment.

"The position of the Republicans on this tariff revision proposition reminds me of a speech I heard a lawyer make in one of the New York courts," said Representative William Sulzer.

"This lawyer was in a bad way. He had nothing. But he put on a bold front and started like this:

"Gentlemen of the jury: Eliminate the law and the facts in this case and what do we see?"—Saturday Evening Post.

WEEKLY DIGEST.

Weekly Digest of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of all the Federal Courts.

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1. **Admiralty**—Costs.—Where the claimant of a libeled vessel has prevailed on the trial, and the libel is dismissed, he is entitled to tax as a part of his costs the premium paid by him to a surety company for a bond to obtain the release of the vessel, where it is reasonable in amount.—The John D. Dailey, U. S. D. C., E. D. N. Y., 158 Fed. Rep. 642.

2. **Adoption**—Parol Adoption.—There is no such thing as a parol adoption known to the law in Pennsylvania.—In re Carroll's Estate, Pa., 68 Atl. Rep. 1038.

3. **Adverse Possession**—Boundaries.—In a boundary dispute between plaintiff and defendant, where plaintiff failed to show any intent to claim more than his deed called for, he could not rely upon adverse possession.—Bradley v. Burkhardt, Iowa, 115 N. W. Rep. 597.

4. **Appeal and Error**—Acts of Part of Appellants.—An appeal by 30 lot owners in an action to restrain the enforcement of a special assessment held not subject to dismissal because of waiver of right to further prosecute the suit by some of the parties appealing.—Bennett v. City of Emmetsburg, Iowa, 115 N. W. Rep. 582.

5. **Error in Judgment Entry**.—Where all questions of fact have been determined without error, the incorporation in the judgment of unauthorized provisions only necessitates a modification of the judgment.—Mason City & Ft. Dodge R. Co. v. Boyton, U. S. C. C. of App., Eighth Circuit, 158 Fed. Rep. 599.

6. **Harmless Error**.—In an action to compel a conveyance of land alleged to have been deeded to defendant's decedent in trust, any error in admitting certain evidence held harmless to plaintiffs.—Mooney v. Mooney, Conn., 68 Atl. Rep. 985.

7. **Harmless Error**.—Error in admitting secondary evidence was harmless where the evidence was immaterial and not controlling, and was not considered.—Maloney v. Geiser Mfg. Co., N. D., 115 N. W. Rep. 669.

8. **Arbitration and Award**—Procedure.—Arbitration proceedings need not follow technical rule and formality; but, if they are honestly and fairly conducted, it is sufficient.—Carlston v. St. Paul Fire & Marine Ins. Co., Mont., 94 Pac. Rep. 756.

9. **Assignments for Benefit of Creditors**—Receivers.—On assignment by firm in brokerage business, seat in stock exchange held to pass to the assignee as against receiver subsequently appointed in suit by creditor against firm.—McClain v. Pittsburg Stock Exchange, Pa., 68 Atl. Rep. 1031.

10. **Bankruptcy**—Attorney's Lien.—The institution of bankruptcy proceedings will not invalidate an attorney's lien on securities belonging to the bankrupt in possession of the attorney.—In re Eulich's Ft. Hamilton Brewery, U. S. D. C., E. D. N. Y., 158 Fed. Rep. 644.

11. **Composition**.—A bankrupt's schedule contemplated by Bankr. Act, c. 541, sec. 12a, which must be filed as a condition to the allowance of a composition, is that required by section 7a, subd. 8, to be filed within ten days after adjudication.—In re Back Bay Automobile Co., U. S. D. C., D. Mass., 158 Fed. Rep. 679.

12. **Corporations Subject to Act**.—A corporation, the principal business of which is the building and construction of concrete arches, bridges, buildings, walls and other structures in situ, the concrete being mixed as used in the structure, which, when completed, became a part of the realty, is not one engaged principally in manufacturing within the meaning of Bankr. Act, sec. 4b, c. 541, and is not subject to adjudication as an involuntary bankrupt.—Hall & Kaul Co. v. Friday, U. S. C. C. of App., Third Circuit, 158 Fed. Rep. 593.

13. **Examination of Bankrupt**.—An alleged bankrupt held not subject to examination touching his property by a compulsory order under Bankr. Act, c. 541, sec. 21a, pending determination of the issues raised by the bankrupt's denial of the petition and prior to adjudication.—In re Davidson, U. S. D. C., D. Mass., 158 Fed. Rep. 678.

14. **Homestead**.—Where a bankrupt was a divorced woman who supported her two minor

children, she was entitled to an exemption in lieu of a homestead as an unmarried female, etc., within Rev. St. Ohio 1906, sec. 5441.—*In re Giles*, U. S. C. C. of App., Sixth Circuit, 158 Fed. Rep. 596.

15.—**Mortgages.**—A court of bankruptcy is without jurisdiction to restrain a sale of mortgaged property under foreclosure decrees based on mortgage liens antedating the filing of the bankruptcy petition and adjudication by more than four months.—*Sample v. Beasley*, U. S. C. C. of App., Fifth Circuit, 158 Fed. Rep. 607.

16.—**Petition to Review.**—On a petition of a bankrupt which brings up for review only an order of the district court adjudging him in contempt for failure to obey a prior order requiring him to turn over property, the propriety of such prior order cannot be considered.—*In re Lans*, U. S. C. C. of App., Second Circuit, 158 Fed. Rep. 610.

17.—**Property Passing to Trustee.**—Title to certain machinery purchased by a corporation which subsequently became a bankrupt held not to have passed to such corporation prior to the intervention of bankruptcy as against the bankrupt's trustee.—*Sprague Canning Machinery Co. v. Fuller*, U. S. C. C. of App., Fifth Circuit, 158 Fed. Rep. 588.

18.—**Sale Under Foreclosure Decree.**—Where foreclosure proceedings were instituted prior to the bankruptcy of the mortgagor on a mortgage given more than four months before, and a receiver was appointed who was in possession of the property at the time of bankruptcy, a sale of the property under the decree in such suit cannot be stayed by the bankruptcy court.—*In re McKane*, U. S. D. C., 158 Fed. Rep. 647.

19.—**Beneficial Associations—Property Rights.**—Fund raised by members of subordinate body of beneficial association for sick and funeral benefits belongs, on revocation of charter by supreme body, to the local body.—*State Council Junior Order of United American Mechanics of Pennsylvania v. Emery*, Pa., 68 Atl. Rep. 1023.

20.—**Bigamy—Evidence.**—In a prosecution for bigamy a certificate of a clerk of court that he has searched his records and finds no record of a license being issued to accused, as provided by Act N. J. 1897 (P. L. p. 378), is inadmissible.—*Pontier v. State*, Md., 68 Atl. Rep. 1059.

21.—**Bills and Notes—Denial of Execution.**—A verified denial of the execution of a note puts in issue the execution, as well as alterations of indorsements of credit on the back of the note.—*Kurth v. Farmers' & Merchants' State Bank of Leonardville*, Kan., 94 Pac. Rep. 798.

22.—**Boundaries—Establishment.**—A boundary line may be established by recognition and acquiescence, although neither of the parties intends to claim more than his deed gives him.—*Bradley v. Burkhart*, Iowa., 115 N. W. Rep. 597.

23.—**Brokers—Commissions.**—Right of a broker on account of commissions, he being authorized to sell 3,000,000 feet of lumber, and the principal refusing to sell when he found a customer, held not affected by the fact that the principal thereafter sold only 2,000,000 feet.—*Obenauer v. Solomon*, Mich., 115 N. W. Rep. 696.

24.—**Employment and Authority.**—A broker's authority to sell certain land for a speci-

fied sum did not authorize an agreement to sell for a part of the price in cash, the balance to be represented by a mortgage on the premises.—*Stengel v. Sergeant*, N. J., 68 Atl. Rep. 1106.

25.—**Building and Loan Associations—Insolvency.**—Where a mortgagor to a building association has paid premiums, interest and dues in excess of the amount of the mortgage debt and interest, he will, on the association becoming insolvent, be entitled to have enough credited on the mortgage to satisfy it, but, as to any excess, he will be allowed only the rate of dividend allowed to other installment shareholders.—*Murphy v. Preston*, Md., 69 Atl. Rep. 114.

26.—**Carriers—Common Law Liability.**—Under the common law, independently of statute, where a common carrier receives property for carriage beyond its own line, issuing a through bill of lading therefor specifying the freight for through carriage, it makes its connecting carriers its agents, and is responsible to the shipper for any loss or damage to such property either on its own or the connecting lines, which liability it cannot limit by contract.—*Smeltzer v. St. Louis & S. F. R. Co.*, U. S. C. C. W. D. Ark., 158 Fed. Rep. 649.

27.—**Demurrage Charges.**—Where the charges of a railroad for demurrage are based on tariffs filed with the Interstate Commerce Commission, such charges as to cars engaged in interstate commerce are conclusively presumed reasonable in a state court.—*Erie R. Co. v. Wanaque Lumber Co.*, N. J., 69 Atl. Rep. 168.

28.—**Express Companies.**—Under Sess. Laws 1907, p. 340, c. 91, secs. 2, 3, express companies doing business in the state after the law took effect may charge for transportation of merchandise within the state a sum not exceeding 75 per cent of the rate in force January 1, 1907, and 30 days after the act was in force such companies must file with the railway commission schedules of rates and classifications in force on that date.—*State v. Pacific Express Co.*, Neb., 115 N. W. Rep. 619.

29.—**Constitutional Law—Burden of Proof.**—The burden of proof is upon those who affirm the unconstitutionality of an act of Congress to show clearly that it is in violation of the constitution. It is not sufficient to merely raise a doubt.—*Smeltzer v. St. Louis & S. F. R. Co.*, U. S. C. C., N. D. Ark., 158 Fed. Rep. 649.

30.—**Contracts—Construction.**—A contract for filling in sand behind a bulkhead construed and held that the risk of the contractor did not include any loss resulting from a breach of duty by the company in erecting the bulkhead.—*N. Risley & Sons v. Ocean City Development Co.*, N. J., 69 Atl. Rep. 192.

31.—**Requisites and Validity.**—Communications of a principal to his agent, simply intended as a delegation of power or instruction to the agent, but which the principal gives the agent no authority to deliver, have not the force of evidence of a contract in favor of a third party.—*Stengel v. Sergeant*, N. J., 68 Atl. Rep. 1106.

32.—**Requisites of Validity.**—Mutuality in the specific performance of contract is essential, and the court exercises its discretion as to specific performance of unilateral contracts with great caution.—*Stengel v. Sergeant*, N. J., 68 Atl. Rep. 1106.

33.—**Corporations—Authority of Officers.**—A corporation held not entitled to deny the au-

thority of its president to act as he did with reference to the purchase of certain machinery and at the same time claim title to the property on account of the transactions between the president and the seller.—*Sprague Canning Machinery Co. v. Fuller*, U. S. C. C. of App. Fifth Circuit, 158 Fed. Rep. 588.

34.—**Corporate Powers.**—A statute authorizing the doing of a certain act by a corporation or by its agent permits the corporation to act either per se through its officer or per alium through its agent.—*American Soda Fountain Co. v. Stolzenbach*, N. J., 68 Atl. Rep. 1078.

35.—**Proceedings by State.**—The state held a proper party to enjoin an ultra vires act by a quasi public corporation which will operate to impair its owners' ability to properly discharge its public duties.—*McCarter v. Pitman, Glassboro & Clayton Gas Co.*, N. J., 69 Atl. Rep. 211.

36. **Costs—Security.**—Where plaintiff filed a bond for costs between a motion for security and the entry of the order, defendant's right to additional security is to be determined as if bond had been given on motion.—*Banes v. Rainey*, 109 N. Y. Supp. 140.

37. **Counties—Juvenile Courts.**—The legislature in establishing a juvenile court in Detroit limited in its jurisdiction to children of that city, may impose the expense of its establishment in part upon the city and in part upon the county as a whole.—*Robison v. Wayne Circuit Judges*, Mich., 115 N. W. Rep. 682.

38. **Courts—Jurisdiction of Supreme Court.**—A wrong of a nature which affects the rights of people throughout the state, when committed by a public service corporation, is a public wrong, and an action to restrain the same by the state is within the jurisdiction of the supreme court.—*State v. Pacific Express Co.*, Neb., 115 N. W. Rep. 619.

39. **Criminal Evidence—Similar Offenses.**—On the trial of a defendant indicted jointly with another for obtaining money by false pretenses, evidence held admissible to show a general scheme between the defendants charged to defraud and other similar offenses committed pursuant to such scheme.—*Griggs v. United States*, U. S. C. C. of App., Ninth Circuit, 158 Fed. Rep. 572.

40. **Criminal Law—Attacking Defendant's Character.**—To describe a defendant as a "bun-coe man" or a "confidence man" in the district attorney's opening in view of evidence to be offered showing that he acted as such in the transaction involved, is not an attack upon his reputation within the rule prohibiting such attack until defendant puts his reputation in evidence.—*People v. Simmons*, 109 N. Y. Supp. 190.

41.—**Jurisdiction.**—Where an assault was committed on land purchased by the United States, and jurisdiction of the state over such lands was vested in the United States by an act of the legislature, and Congress passed an act for the punishment of such offense, it was the exercise of power conferred by Const. U. S. art. 1, sec. 8, and is exclusive, and the state courts have no jurisdiction.—*State v. Morris*, N. J., 68 Atl. Rep. 1103.

42. **Criminal Trial—Change of Venue.**—Granting a motion for a change of venue in a criminal prosecution lies in the discretion of the trial court.—*People v. Boyd*, Mich., 115 N. W. Rep. 687.

43.—**Conduct of Counsel.**—In a trial for lar-

ceny committed by confidence men, held not reversible error for the district attorney to offer certain articles for identification after they had been excluded.—*People v. Simmons*, 109 N. Y. Supp. 190.

44.—**Withdrawal of Plea.**—After accused has pleaded not guilty and traversed before the country, he is not entitled to withdraw his plea and file pleas in abatement without leave of court.—*Pontier v. State*, Md., 68 Atl. Rep. 1059.

45. **Damages—Personal Injuries.**—In a personal injury action an instruction authorizing the jury in fixing the amount of damages to take into consideration plaintiff's condition in life held erroneous.—*Skiles v. St. Louis, I. M. & S. Ry. Co.*, Mo., 108 S. W. Rep. 1082.

46. **Death—Presumptions.**—In an action on a life insurance policy, where the person insured had not been heard of for many years, certain evidence held proper to be considered in determining whether death should be presumed.—*Modern Woodmen of America v. Gerdorn*, Kan., 94 Pac. Rep. 788.

47. **Dedication—Maps.**—Adoption of a map of a city indicating certain blocks as public squares by the original owners for the purpose of partition held a formal dedication of such squares to the public or an abandonment to public use.—*Cassery v. Alameda County*, Cal., 94 Pac. Rep. 765.

48. **Deeds—Delivery.**—The delivery of a deed with the grantee's name and the consideration in blank carries the implied authority to fill out the blanks or cause them to be filled out.—*Creveling v. Banta*, Iowa, 115 N. W. Rep. 598.

49. **Divorce—Desertion.**—Mere lapse of time does not cause a desertion, without culpability in its inception to ripen it into one of wilfulness.—*Topfer v. Topfer*, N. J., 68 Atl. Rep. 1071.

50. **Easements—Construction of Grant.**—A grant of the right to enter on lands to dig and build a reservoir held not a right to occupy one-half acre with reservoirs, but the right to build a single reservoir whose dimensions shall not exceed such area.—*Sked v. Pennington Spring Water Co.*, N. J., 69 Atl. Rep. 182.

51.—**Increase of Use.**—Where an elevated road took an easement for the purpose of a permanent structure, the right to acquire such easement by prescription is not affected by the fact that many more trains are run of late on such structure than at first.—*Taggart v. Manhattan Ry Co.*, 109 N. Y. Supp. 38.

52.—**Intent of Parties.**—The creation of an easement is founded on the mutual intent of the parties as gathered from the acts as well as the circumstances and the words of the parties.—*Liquid Carbonic Co. v. Wallace*, Pa., 68 Atl. Rep. 1021.

53. **Electricity—Injuries.**—Defendant held bound to use a high degree of care in constructing and maintaining its wires conducting a high voltage of electricity, and to take notice that the duties of employees of a railway company required them to work near the place where defendant strung its wires.—*Cutler v. Putnam Light & Power Co.*, Conn., 68 Atl. Rep. 1006.

54. **Eminent Domain—Condemnation Proceedings.**—A complaint to condemn property held sufficient where it alleges that the use thereof is necessary to the construction, maintenance or operation of the railroad.—*Northern Pac. Ry. Co. v. Kreszewski*, N. D., 115 N. W. Rep. 679.

55.—**View by Jury.**—On appeal from award of commissioners in condemnation, instruction that the jury's view of the premises might be used by them in forming their judgment of the testimony held not error.—*Hinners v. Edgewater & Ft. L. R. Co.*, N. J., 69 Atl. Rep. 161.

56. **Equity**—**Pleading.**—Where the question is whether or not the amendment constitutes a new bill and is therefore improper, the amendment alone goes down under a demurrer, and the original bill is left on the record.—*Lynch's Adm'r v. Murray*, Vt., 69 Atl. Rep. 133.

57. **Estoppel**—**Lost Deeds.**—A party cannot be estopped to assert his rights to recover damages for injuries to easements on a mere presumption of a lost deed arising from mere lapse of time.—*Goggin v. Manhattan Ry. Co.*, 109 N. Y. Supp. 83.

58. **Evidence**—**Opinions.**—In an action to replevy goods distrained, it was proper to overrule a witness' testimony as to value, upon the ground that the witness was giving an opinion without showing any experience by purchase or otherwise that he was qualified.—*Whitcomb v. Brant*, N. J., 68 Atl. Rep. 1102.

59. **Exchange of Property**—**Abandonment of Property.**—Evidence held to show that plaintiff with defendant's knowledge and acquiescence treated as abandoned a contract between the parties.—*Norton v. Hinecker*, Iowa, 115 N. W. Rep. 612.

60. **Executors and Administrators**—**Title and Rights.**—Title and rights of executor are created by the will and not by its probate, which is evidence thereof, and in this respect it relates back to testator's death.—*Deck v. Fahrenheitz*, Md., 68 Atl. Rep. 1048.

61. **False Pretenses**—**Indictment.**—Under an indictment for obtaining money by false pretenses, it is a question for the jury, not whether the false representation made was calculated to deceive a prudent person, but whether it was calculated to deceive the person to whom it was made.—*Griggs v. United States*, U. S. C. of App., Ninth Circuit, 158 Fed. Rep. 572.

62. **Fixtures**—**Intent in Making Annexation.**—The intention with which an article is annexed to the freehold determines its character as a fixture.—*City of Portland v. New England Telephone & Telegraph Co.*, Me., 68 Atl. Rep. 1040.

63. **Fraud**—**Consequential Damages.**—Damages sustained by personal injuries received by a tenant, resulting consequentially from deceit and misrepresentations of the landlord's agent, held recoverable in an action for the deceit of the agent.—*Williams v. Goldberg*, 109 N. Y. Supp. 15.

64. **Frauds, Statute of**—**Pleading.**—An answer pleading the statute of frauds held a good defense to an action to enforce a contract to convey real property, the complaint in which did not allege whether the contract was oral or in writing.—*Gross v. Gorsch*, 109 N. Y. Supp. 234.

65.—**Sale of Land.**—In an action for specific performance of a contract to sell real estate, the written agreement relied upon consisting of a series of letters, parol evidence was inadmissible to show who the vendee was.—*Stengel v. Sergeant*, N. J., 68 Atl. Rep. 1106.

66. **Fraudulent Conveyances**—**Presumptions.**—Under Rev. Laws 1905, secs. 3496, 3503, failure of vendee of a stock of goods to secure an in-

ventory or inquire as to vendor's creditors held to render the sale presumptively fraudulent.—*Gilbert v. Gonyea*, Minn., 115 N. W. Rep. 640.

67.—**Presumptions.**—To establish the presumption that a certain trust was intended to defeat future creditors of the settler held not necessary that the possibility of future creditors should be expressly recognized, or that the intention to bar them should be expressly declared.—*Ward v. Marie*, N. J., 68 Atl. Rep. 1084.

68. **Garnishment**—**Failure to Answer.**—A garnishee who defaults thereby admits that he has property in his possession belonging to the principal defendant.—*Minneapolis, St. P. & S. M. Ry. Co. v. Pierce*, Minn., 115 N. W. Rep. 649.

69. **Gifts**—**Causa Mortis.**—A gift causa mortis may be effected by delivery to a third person in trust for the donee, though the gift does not come to the knowledge of the donee, and is not accepted by him until after the death of the donor.—*In re Podhajsky's Estate*, Iowa, 115 N. W. Rep. 590.

70. **Highways**—**Notice of Claim for Injuries.**—A notice of a claim for injuries to a traveler caused by a defective highway held to locate the place of the injury as on a highway in a designated town.—*Graves v. Town of Waltsfeld*, Vt., 69 Atl. Rep. 137.

71.—**Right to Use.**—The driver of a horse and wagon and of an automobile must each exercise his right on the highway with due regard to the other's right.—*Towle v. Morse*, Me., 68 Atl. Rep. 1044.

72. **Husband and Wife**—**Contract of Wife to Adopt.**—In equity, contracts directly between husband and wife which are bona fide and on good consideration may be enforced if for the benefit of the wife.—*Brown v. Clark*, Conn., 68 Atl. Rep. 1001.

73. **Indictment and Information**—**Sufficiency.**—That an indictment is indorsed on the margin as having been based on a particular statute is immaterial, such indorsement being no part of the indictment which is good if it charges an offense under any statute, although indorsed and purporting to be drawn under a different one.—*Wechsler v. United States*, U. S. C. of App., Second Circuit, 158 Fed. Rep. 579.

74. **Injunction**—**Preliminary Injunction.**—A temporary injunction commanding plaintiff in an action in the nature of interpleader to retain possession of the fund may be modified on proper application so as to require payment into court.—*Phoenix Ins. Co. v. Carey*, Conn., 68 Atl. Rep. 993.

75. **Interest**—**Judgment.**—The debtor is not liable for interest on a judgment while its payment is restrained by injunction, unless he has derived advantage from use of the money.—*Phoenix Ins. Co. v. Carey*, Conn., 68 Atl. Rep. 993.

76. **Interstate Commerce**—**Power of Congress.**—The power of Congress under the interstate commerce clause of the Constitution is plenary and without limitations other than those prescribed in the Constitution itself.—*Smeltzer v. St. Louis & S. F. R. Co.*, U. S. C. C. W. D. Ark., 158 Fed. Rep. 649.

77. **Judgment**—**Matters Concluded.**—A judgment holding an ordinance relieving an assessment for a public improvement unconstitutional held not binding in another proceeding to test the validity of a new ordinance.—*Haggart v. Kansas City, Kan.*, 94 Pac. Rep. 789.

78.—**Report of Commissioners.**—The report of commissioners upon an intestate insolvent estate is not such a final judgment as will conclude the parties in interest.—*Brown v. Clark*, Conn., 68 Atl. Rep. 1001.

79.—**Revival.**—Unless some witness having knowledge of the fact testifies to the non-payment of a dormant judgment on a motion to revive, it is incumbent on the judgment creditor to rebut the presumption of payment.—*Platte County Bank v. Clark*, Neb., 115 N. W. Rep. 787.

80.—**Jury—Competency.**—One is not incompetent as a juror in a criminal case merely because he has formed and expressed an opinion as to the guilt or innocence of a person jointly indicted with the defendant on trial.—*Griggs v. United States*, U. S. C. C. of App., Ninth Circuit, 158 Fed. Rep. 572.

81.—**Justices of the Peace—Continuance.**—Where a justice took an adjournment from Saturday to Monday, the docket entry being, "Case adjourned till Monday 1 o'clock P. M.," an objection that the judge lost jurisdiction because the docket was not sufficiently definite held properly overruled.—*Hanson v. Gronlie*, N. D., 115 N. W. Rep. 666.

82.—**Landlord and Tenant—Tenancy from Year to Year.**—Where a tenant from year to year remains in possession after the expiration of the year with the acquiescence of the landlord, and without a new agreement, a tenancy for a new year commencing on that date is created.—*Griswold v. Town of Branford*, Conn., 68 Atl. Rep. 987.

83.—**Life Estates—Income.**—Where defendant, acting in the capacity of trustee and also as life tenant, sold and converted land into money, he is entitled only to the interest on or income from the principal fund thus substituted for the land; and on his removal as trustee he must turn over to his successor the principal fund.—*Beach v. Beers*, Conn., 68 Atl. Rep. 990.

84.—**Limitation of Actions—Unlawful Structures in Street.**—A proceeding to compel the removal of certain unlawful structures in a street appurtenant to an adjoining building held not barred by limitations until after the lapse of 20 years.—*People v. Ahearn*, 109 N. Y. Supp. 249.

85.—**Lis Pendens—Notice.**—Under Rev. Code Civ. Proc., sec. 108, relating to notice of lis pendens, a judgment against plaintiff's grantor rendered prior to the recording of plaintiff's deed in an action in which no notice of lis pendens was filed, held not to affect plaintiff's rights.—*Gilman v. Carpenter*, S. D., 115 N. W. Rep. 659.

86.—**Master and Servant—Injuries to Servant.**—A master furnishing a safe appliance held not liable for injuries received by servant resulting from use of such appliances when out of condition.—*Laragy v. East Jersey Pipe Co.*, N. J., 68 Atl. Rep. 1073.

87.—**Mechanics' Liens—Original Contractor.**—No formal or written assignment is necessary to transfer a claim of mechanic's lien from a partnership on its dissolution to its individual members; the equitable lien passing with the transfer of the debt secured.—*Soule v. Borelli*, Conn., 68 Atl. Rep. 979.

88.—**Mines and Minerals—Work Done by Stockholder.**—A stockholder in a mining company has such a beneficial interest in the corporate property that any mining work done by him on unpatented claims of the company must

be counted as representation work, and if sufficient in amount and done at the proper time, will prevent a forfeiture of the claims.—*Wailles v. Davies*, U. S. C. C., D. Nev., 158 Fed. Rep. 667.

89.—**Mortgages—Coupon Notes.**—That coupon notes for the annual interest on the mortgage notes run in part to the mortgagee and in part to a third person or bearer does not destroy the lien of the mortgage for the total interest secured.—*Kingsley v. Anderson*, Minn., 115 N. W. Rep. 642.

90.—**Municipal Corporations—Curative Statutes.**—Where the legislature might originally have refused to property owners the right to choose the kind of paving for streets, it has the power to cure a proceeding for such a public improvement defective because the property owners were deprived of that right conferred upon them by law.—*Haggart v. Kansas City*, Kan., 94 Pac. Rep. 789.

91.—**Ordinances.**—A lunch wagon moved from without to within the fire limits, placed on a city lot, and there connected with gas, telephone and electric light wires, held a building or structure as used in an ordinance prohibiting the erection of any frame building within fire limits.—*Town of Montclair v. Amend*, N. J., 68 Atl. Rep. 1067.

92.—**Ordinances.**—A contractor constructing a sewer in streets wherein gas pipes have been theretofore laid is not an insurer against injury to the pipes.—*Millville Gas Light Co. v. Sweeten*, N. J., 68 Atl. Rep. 1067.

93.—**Proceedings of City Council.**—Where minutes of council meeting showed what members of the council were present, that a roll-call was had, and that all voted one way, failure of clerk to rewrite the names of the member in recording the vote held not a non-compliance with the statute requiring a record of the yeas and nays.—*Bennett v. City of Emmetsburg*, Iowa, 115 N. W. Rep. 582.

94.—**Rights of Laborer in Street.**—The rights of a laborer whose duties require him to be in that part of a street devoted to the use of vehicles cannot be determined by the rules applicable to pedestrians with no occupation requiring their presence in that part of the street.—*King v. Green*, Cal., 94 Pac. Rep. 777.

95.—**Structures in Street.**—A lessee of adjoining property held not estopped by mere silence to compel the removal of the structures in a street adjacent to abutting property by which such lessee was specially damaged.—*People v. Ahearn*, 109 N. Y. Supp. 249.

96.—**Torts.**—In an action for injuries resulting from the negligent manipulation of a water hydrant, instructions failing to recognize or state the doctrine of exemption from liability while in the exercise of governmental functions held erroneous.—*Judson v. Borough of Winstead*, Conn., 68 Atl. Rep. 999.

97.—**Negligence—Evidence.**—In an action to recover for injuries by being struck on the head by a piece of coal, plaintiff must fail if the evidence does not show that the injury was the result of defendant's negligence, where from the evidence it was just as probable that it was the result of the act of another than defendant.—*Stumpf v. Delaware, L. & W. R. Co.*, N. J., 69 Atl. Rep. 207.

98.—**Imputed Negligence.**—Father held not precluded from recovering for injuries to his minor son because he permitted him to go on

the street unattended.—*Saxton v. Pittsburg Rys. Co.*, Pa., 68 Atl. Rep. 1022.

99.—**Necessity of Showing.**—To hold one liable on the ground of negligence, held, it is not enough to show negligence and an accident; how it happened being mere conjecture.—*Davis v. Joslin Mfg. Co.*, R. I., 69 Atl. Rep. 65.

100.—**Steam Boilers.**—Where plaintiff was injured by the explosion of a boiler, caused by its negligent construction by defendant, plaintiff held entitled to recover therefor, though there was neither contractual relation between plaintiff and defendant, nor deceit claimed in the sale of the boiler.—*Statler v. George A. Ray Mfg. Co.*, 109 N. Y. Supp. 172.

101.—**New Trial.**—Notice of Intention to Apply.—Under Rev. Code Civ. Proc., secs. 301, 303, a certain notice of intention to move for a new trial upon certain grounds on a bill of exceptions to be thereafter settled, held sufficient, though grounds were merely stated generally.—*Gilman v. Carpenter*, S. D., 115 N. W. Rep. 659.

102.—**Parties** — Intervention. — The district court may in cases not provided for by the Code permit one not a party to a suit to intervene either before or after judgment for the protection of some right. — *Gibson v. Ferrell*, Kan., 94 Pac. Rep. 783.

103.—**Partnership.**—Impeachment.—In an action by judgment creditors of a partnership to reach an interest in land transferred, evidence considered and held to show that the property was transferred in payment of individual debts of the partners.—*Clark-Jewell-Weils Co. v. Tolsma*, Mich., 115 N. W. Rep. 688.

104.—**Mechanics' Liens.**—A partnership statutory lien for materials and labor furnished in the improvement of real estate vests not in the partnership, but in its individual members, the partnership having only an equitable interest.—*Soule v. Borelli*, Conn., 68 Atl. Rep. 979.

105.—**Perjury.**—False Oath in Bankruptcy Proceedings.—Bankr. Act July 1, 1898, c. 541, sec. 7, 30 Stat. 548 (U. S. Comp. St. 1901, p. 3424), which requires a bankrupt to submit to an examination under oath as to various matters specified, with the proviso that "no testimony given by him shall be offered in evidence against him in any criminal proceeding," does not give immunity from prosecution for giving false testimony upon any such examination.—*Wechsler v. United States*, U. S. C. C. of App. Second Circuit, 158 Fed. Rep. 579.

106.—**Pleading.**—Executory Contracts.—In an action for breach of an executory contract where defendant demurred, he admitted the truth of the facts pleaded, and where one of those facts was a failure to perform on his part, and an offer of full performance by plaintiff, such refusal placed defendant in default.—*Foster County Implement Co. v. Smith*, N. D., 115 N. W. Rep. 669.

107.—**Oyer of Instrument Sold On.**—A bond, oyer of which was had in an action thereon, held a part of the declaration, so that failure to allege performance of its conditions might be raised by a demurrer.—*Earle v. Fidelity & Deposit Co. of Maryland*, N. J., 68 Atl. Rep. 1078.

108.—**Powers.**—Execution.—In creating a power of appointment, the phrase that it may be exercised "by any writing in the nature of a last will and testament," is apt where the possessor of such power has no other property to

dispose of.—*White v. Holly*, Conn., 68 Atl. Rep. 997.

109.—**Principal and Agent.**—Authority of Agent.—After ratification of an unauthorized act of another, with full knowledge of the facts, the principal is bound as if it had been done by his previous authority.—*Looschen Piano Case Co. v. Steinberg*, N. J., 68 Atl. Rep. 1072.

110.—**Liability for Acts of Agent.**—A landlord is answerable for injuries resulting from the misrepresentations and deceit of his agent in respect to premises leased by him, where the representations were made within the scope of the agent's duties.—*Williams v. Goldberg*, 109 N. Y. Supp. 15.

111.—**Quietting Title.**—Evidence.—A certain trust deed and various assignments thereof held not admissible against a plaintiff who claimed no rights thereunder.—*Gilman v. Carpenter*, S. D., 115 N. W. Rep. 659.

112.—**Railroads.**—Leases.—Where a railroad lease contains a covenant of quiet enjoyment of the premises a clause therein releasing the lessor from any claim for damages by reason of any defect in title of the demised property held not to be extended to include expenses of protecting the title.—*Brooklyn Heights R. Co. v. Brooklyn City R. Co.*, 109 N. Y. Supp. 31.

113.—**Reference.**—Part of Issues.—In an action at law, where the whole issues should not be so tried, the court cannot refer a particular issue for trial by a referee and leave the remainder to be tried by a jury.—*Claffey v. Madison Avenue Co.*, 109 N. Y. Supp. 1.

114.—**Reformation of Instruments.**—Mutual Mistake.—A paving contract with a city held not subject to reformation in the absence of fraud or satisfactory showing of mutual mistake.—*Fullerton v. City of Des Moines*, Iowa, 115 N. W. Rep. 607.

115.—**Replevin.**—Wrongful Distress.—In replevin the legality of the distress may be tried, provided there is no rent due; but if there is rent due, however small, and the distress is excessive in regard to the quantity of goods taken or otherwise irregular, the remedy of the tenant must be had in an action on the case.—*Whitcomb v. Brant*, N. J., 68 Atl. Rep. 1102.

116.—**Sales.**—Passing of Title.—Where personality is sold for cash on delivery, payment of the price is a condition precedent to the passing of title, and unless made, the seller may reclaim the property.—*Sprague Canning Machinery Co. v. Fuller*, U. S. C. C. of App. Fifth Circuit, 158 Fed. Rep. 588.

117.—**Reasonable Time to Accept.**—Under an executory contract of sale of machinery, guaranteed to work satisfactorily, if on reasonable trial it does not work satisfactorily, held sufficient if within a reasonable time purchaser notify vendor that he declines to accept it.—*Mulcahy v. Diendonne*, Minn., 115 N. W. Rep. 636.

118.—**Salvage.**—Amount of Award.—A tug held entitled to a salvage award for towing a steamer from a wharf near a burning building, in the absence of the master, although on his return he terminated the service and attempted to repudiate that already rendered.—*The Ragnarok*, U. S. D. C., E. D. N. Y., 158 Fed. Rep. 694.

119.—**Suit for Compensation.**—False allegations in a libel for salvage as to the service rendered and excessive claims for compensa-

tion may determine a doubtful case against the libellant, or may justify the denial of any compensation for services rendered or the reduction of the amount.—*The Ragnarok*, U. S. D. C., E. D. N. Y., 158 Fed. Rep. 694.

120. **Statutes—Fixtures.**—Whether the expression of one thing in a statute is an exclusion of another held a question of intention to be gathered from all parts of the statute.—*City of Portland v. New England Telephone & Telegraph Co., Me.*, 68 Atl. Rep. 1040.

121. **Time of Taking Effect.**—An act providing that it shall take effect on and after its passage and approval does not express an emergency under Const. art. 3, sec. 24, and it does not take effect until three months after the adjournment of the legislature.—*State v. Pacific Express Co., Neb.*, 115 N. W. Rep. 619.

122. **Street Railroads—Injury to Passenger.**—Where a little girl walked to the rear platform, and the car slowed down and ran into a turn-out, and the child fell from the platform, no inference arose that the accident occurred by negligence in handling the car.—*Pascell v. North Jersey St. Ry. Co., N. J.*, 69 Atl. Rep. 171.

123. **Negligence.**—In an action against a street railway company to recover for injuries to a boy five years old, injured while riding on the step of the platform of a car, the question of negligence of defendant on conflicting evidence was for the jury.—*Saxton v. Pittsburgh Rys. Co., Pa.*, 68 Atl. Rep. 1022.

124. **Taxation—Tax Titles.**—The burden is on one claiming under a tax collector's deed to prove the regularity of every antecedent act necessary to the validity of the tax, the levy, and the sale.—*Brush v. Watson, Vt.*, 69 Atl. Rep. 141.

125. **Telegraphs and Telephones—Conduits laid in streets by a telephone and telegraph company to carry its wires held not real estate within Rev. St. c. 8, secs. 36, 41, declaring that real estate, etc., shall be taxed in the municipality in which situated.**—*City of Portland v. New England Telephone & Telegraph Co., Me.*, 68 Atl. Rep. 1040.

126. **Tender—Sufficiency.**—A creditor ordinarily is not compelled to accept his debtor's check in payment of the indebtedness, and an offer thereof is insufficient to constitute a tender.—*Rumpf v. Schiff*, 109 N. Y. Supp. 51.

127. **Trade Marks and Trade Names—Infringement.**—To establish infringement of a trade mark it is not essential to show that any one has actually been deceived or an intent to deceive, although proof that persons have been deceived is pertinent and persuasive evidence that the mark complained of is calculated and was intended to deceive.—*American Tin Plate Co. v. Licking Roller Mill Co., U. S. C. C., E. D. Ky.*, 158 Fed. Rep. 690.

128. **Marking of Patented Article.**—An arbitrary symbol or device stamped by the manufacturer only on articles made under certain patents on the expiration of such patents becomes public property, and its use by others does not constitute unfair competition.—*Greene Tweed & Co. v. Manufacturers' Belt Hook Co., U. S. C. C., N. D. Ill.*, 158 Fed. Rep. 640.

129. **Trespass—Persons Liable.**—Where defendant sold standing timber to one, and afterward conveyed the land to another, he is not liable for the purchaser of the timber subsequently going on the land and removing the

timber, where he did nothing to instigate such trespass.—*Lamb v. Willis*, 109 N. Y. Supp. 75.

130. **Trial—Review.**—Where plaintiff instituted suit against defendant, and pending the suit assigned his right of action to another, such assignee was entitled to continue the suit in plaintiff's name.—*Elsberg v. Honeck, N. J.*, 68 Atl. Rep. 1090.

131. **Trusts—Counsel Fees.**—The court in an action by one individually and as trustee against the substituted trustee and beneficiaries may in its discretion make an allowance in the judgment for the attorneys of the trustee.—*Case v. Beloe*, 109 N. Y. Supp. 168.

132. **Life Estates.**—A claim for money paid by a life tenant for the benefit of the trust estate and assigned to the trustee should be allowed the trustee on his accounting with his successor.—*Beach v. Beers, Conn.*, 68 Atl. Rep. 990.

133. **Waters and Water Courses—Irrigation.**—In a suit to determine the priorities of several appropriators of water, the users and consumers of water under a canal that has appropriated water for the purpose of sale are not necessary parties.—*Farmers' Co-Operative Ditch Co. v. Riverside Irr. Dist., Idaho*, 94 Pac. Rep. 761.

134. **Wills—Coercion.**—That testator gave most of his estate to another does not furnish evidence of coercion and restraint in connection with the making of the will.—*Allshouse v. Kelly, Pa.*, 69 Atl. Rep. 88.

135. **Conditions and Restrictions.**—The intention of a testator should be carried out in respect to restrictions and limitations which he imposes upon that which is his own to give or withhold at his pleasure, provided he does not contravene public policy.—*Stier v. Nashville Trust Co., U. S. C. C. of App., Sixth Circuit*, 158 Fed. Rep. 601.

136. **Inconsistent Provisions.**—An expression in a will, following a devise in fee simple, that if there were anything left the devisee should divide it among the children, held not to annex any condition to the devise.—*Bennett v. McLaughlin*, 109 N. Y. Supp. 63.

137. **Undue Influence.**—In proceedings to probate a will, evidence examined and held insufficient to take the case to the jury on the question of undue influence in its execution.—*In re Hoffman's Estate, Mich.*, 115 N. W. Rep. 690.

138. **Undue Influence.**—A testator not only has the legal right to make a will, but he may make as many wills as he chooses, and the mere fact that a change is made in a later will is not of itself evidence that testator was unduly influenced in making such change.—*In re Young's Estate, Utah*, 94 Pac. Rep. 731.

139. **Validity.**—While an illicit relation existing between a testator and a beneficiary and an unjust and unnatural disposition of his property are circumstances properly to be considered in connection with evidence of undue influence, they are not of themselves evidence either of fraud or of undue influence.—*Saxton v. Krumm, Md.*, 68 Atl. Rep. 1056.

140. **Witnesses—Cross-Examination.**—It is within the discretion of the court to permit the cross-examination of a witness who is also a party as to a matter aside from the scope of the examination in chief.—*N. Risley & Sons v. Ocean City Development Co., N. J.*, 69 Atl. Rep. 192.

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ENFORCEMENT OF OBSOLETE LAWS.

Whether a court has the right to refuse to enforce a law merely because it is obsolete, is not a debatable question although many so-called statesmen and many editors of the secular press have found in it opportunity for profound argument. But our esteemed contemporary, the National Corporation Reporter, calls our attention to the recent case of *District of Columbia v. Robinson*, 36 Wash. Law Rep. 101, where the court in that case claims the right to disregard an obsolete law, under proper circumstances. The defendant in that case was charged with a violation of an old statute of Maryland, adopted in 1723, and which had been adopted by Congress, along with the other statutes of Maryland, as the law of the District of Columbia at the time of its organization. The statute provided that "no person should work on the Lord's day," etc., and that every person transgressing the act and being thereof convicted, by the oath of one sufficient witness or confession of the party, before the Police Court, should forfeit 200 pounds of tobacco, to be levied and applied as aforesaid."

We are inclined to agree with our contemporary's criticism that "so far as this portion of the act is concerned the statute seems to have differed very little from the statutes which have been upheld in many states as proper police regulations, and the fact that the original act from which this provision was taken, had provided for

barbarous punishments against blasphemers, swearers, drunkards and Sabbath breakers, and other persons guilty of theological offenses (all of which provisions seem to have been eliminated before the act was adopted by the federal government for the District of Columbia), affords no reason why that portion of the act which was left and which was not itself offensive to the provisions of the federal constitution, should not have been enforced."

It is quite a dangerous doctrine to be allowed to creep into the state, that courts can refuse to enforce a law merely because it is "obsolete." What right has any court to consider such a purely legislative question?

There is often a great hue and cry raised when some reformer like Gov. Hughes of New York or Gov. Folk of Missouri discovers some law on the statute books which previous administrations have not seen fit to enforce; and the suggestion has come from the public press that the refusal to enforce a law for thirty, fifty or even a hundred years has nullified the law, and that the governor is guilty of oppression in office in asking for its enforcement.

This is all very strange doctrine and its adherents are becoming bolder every year, making necessary that a note of warning be sounded.

If the doctrine be a good one then any party or executive in power who for any number of years refuses to enforce certain laws can justify the courts on some future application for their enforcement, in nullifying them on the ground that they have become obsolete.

Such a conclusion is absolutely violative and destructive of our three-fold scheme of government. If the executive

and judicial departments of government can thus combine to nullify the work of the legislative department the latter arm of the government becomes instantly powerless and atrophied by the severe restraint thus imposed upon it. It would be better to return to the great Anglo-Saxon scheme of government and make parliament supreme over all than to allow the courts to combine with the executive to nullify legislation by non-enforcement.

It is true that most of the so-called "obsolete" legislation relates usually to the public morality and are frequently termed "blue laws," having been promulgated at a time when public sentiment supported a strict enforcement of the Sabbath, the suppression of gambling, the severe punishment of drunkenness, blasphemy and indecent speech. But no matter what the color of the law may be, if it be not violative of existing constitutional restrictions, it should and must be enforced by the courts whenever such enforcement is demanded through the proper channels.

We have often heard the argument used that a certain law is "dead" and obsolete and no longer supported by public opinion. We have a distinct recollection of such an argument in regard to a very strict Sunday law in a certain state which, when it was sought to be repealed, was approved by a large majority of the legislature.

It is, therefore, presumptuous on the part of any court to pronounce the nullification of any law on the ground that it is "obsolete" until the legislature has directly or indirectly indicated its intention to repeal it. It is proper and the duty of every court to enforce every law duly enacted and in force, leaving to the legislature the obligation to repeal all obsolete or obnoxious legislation.

NOTES OF IMPORTANT DECISIONS

INSURANCE—SUICIDE—PRESUMPTIONS.

—The presumption against suicide is discussed in *Connell v. Iowa State Traveling Men's Association* (Iowa), 116 N. W. Rep. 820. It is held that the presumption against suicide is so strong that it has the force of affirmative evidence, and that to establish a defense of suicide the facts and circumstances proved must be such as to exclude any other reasonable hypothesis. The facts as recited by the court, are as follows:

"Near noon on October 24, 1906, the deceased was found about 4 feet from Birdland, a driveway in Des Moines from Sixth avenue north of the Des Moines river through Woodland to Union Park, about a third of the way from the Gun Club to the street railway bridge. He was lying on his back under a tree, with his head to the west, his left arm resting on the body and extending down near the abdomen, and his right arm extending over the stomach to the elbow of the left. There was a bullet wound at the parietal eminence; that is, above and in front of the ear, near the part of the hair on the left side of the head. There was no indication of the direction of the bullet, and no powder marks or other discoloration near were noticed. Deceased had a handful of cartridges in his right trouser pocket. A revolver was lying beneath the left elbow. Two chambers were empty, and the others loaded. Death resulted from the wound. Appellee insists that the evidence proved suicidal death, and no doubt such an inference might be drawn. But we do not regard the evidence as conclusive. The circumstances were not necessarily inconsistent with the conclusion that it might have been homicidal, nor is the inference that it was accidental necessarily excluded. The burden of proof was on the association to establish this defense. The presumption that death was accidental has the force of affirmative evidence, and before it can be said that the defense conclusively is established, the facts and circumstances proven must be such as to exclude any other reasonable hypothesis than that it resulted from suicide. *Stephenson v. Bankers' Life Ass'n*, 108 Iowa, 637, 79 N. W. Rep. 459. In that case the theory that death was self-inflicted had much stronger support in the evidence than in the case at bar, and yet the court held that the issue was for the jury. In *Inghram v. National Union*, 103 Iowa, 404, 72 N. W. Rep. 559, and also in *Beverly v. Supreme Tent Maccabees*, 115 Iowa, 526, 88 N. W. Rep. 1054, the evidence was such as to lead irresistibly to but the one conclusion that death

was self-inflicted. No advantage is to be derived from a revival of the cases, for the facts of no two are alike. The plain recital of the facts is the best answer to the contention that the inference of suicide was necessarily to be drawn therefrom. The issue was for the jury."

VALIDITY OF A STATUTE PROVIDING THAT ACCEPTANCE FROM RELIEF ASSOCIATION SHALL BE NO BAR TO AN ACTION FOR DAMAGES.

In a recent case in Iowa, where a statute providing that under certain circumstances railroad companies shall be liable in damages to its employees, and that in such case no contract of insurance, relief, benefit, or indemnity, shall be available to the company as a defense to an action by the employee for the recovery of such damages, the court held that it operated equally on all railroad companies within the state, that it constituted a proper subject of classification, and therefore was not unconstitutional, as a violation of the equality clause of the federal constitution, and that it was a proper exercise of the police power of the legislature, and therefore was not objectionable as an unconstitutional restriction on the railroad's liberty of contract.¹

In *Shaver v. Pennsylvania Co.*,² where a similar statute was involved, the court held the contract valid and the statute void. The facts in both cases are similar. In the latter an action was brought to recover damages for personal injuries alleged to have resulted from the negligence of a railroad corporation and its agents. The defense was that the plaintiff, by becoming a member of an organization known as the "Voluntary Relief Department of the Pennsylvania Lines West of Pittsburgh," and accepting the benefits of said association, had agreed that the railroad company should

be discharged from any and all liability to him on account of such injuries. The plaintiff demurred to the answer upon the ground that the agreement referred to was invalid under the statute of Ohio of 1890, which provides in its first section that "no railroad company, insurance society, or association, or other person, shall demand, accept, require, or enter into any contract, agreement, stipulation, with any other person about to enter, or in the employ of any railroad company, whereby such person stipulates or agrees to surrender or waive any right to damages against any railroad company, thereafter arising for personal injury or death, or whereby he agrees to surrender or waive, in case he asserts the same, any right to damages against any railroad company, thereafter arising for personal injury or death, or whereby he agrees to surrender or waive, in case he asserts the same, any other right whatever; and all such stipulations or agreements shall be void," etc. The statute in the Iowa cases reads as follows: "Every corporation operating a railway shall be liable for all damages sustained by any person, including the employees of such corporation, in consequence of the neglect of the agents, or by any mismanagement of the engineers or other employees thereof, and in consequence of the wilful wrongs, whether of commission or omission of such agents, engineers or other employees, when such wrongs are in any manner connected with the use and operation of any railway on or about which they shall be employed, and no contract which restricts such liability shall be legal or binding," and the following amendment also passed upon by the court reads: "Nor shall any contract of insurance, relief, benefit or indemnity in case of injury or death, entered into prior to the injury, between the person so injured and such corporation or other person or association acting for such corporation, nor shall the acceptance of any such

(1) *McGuire v. Chicago B. & Q. R. Co.*, 108 N. W. Rep. 102.

(2) 71 Fed. Rep. 331.

(3) Code sec. 2071.

relief, insurance, benefit or indemnity by the person injured, his widow, heirs or legal representatives after the injury, from such corporation, person or association, constitute any bar or defense to any cause of action brought under the provisions of this section; but nothing contained herein shall be construed to prevent or invalidate any settlement for damages between the parties subsequent to the injuries received." In the Shaver case the court said: "The Ohio statute, in denying to the employees of a railroad corporation the right to make their own contracts concerning their own labor, is depriving them of liberty, and of the right to exercise the privileges of manhood, 'without due process of law.' Being directed solely to employees of railroads, it is class legislation of the most vicious character. Laws must be not only uniform in their application throughout the territory over which the legislative jurisdiction extends, but they must apply to all classes of citizens alike. There cannot be one law for railroad employees, another law for employees in factories, and another law for employees on a farm or the highways. Class legislation is dangerous. Statutes intended to favor one class often become oppressive, tyrannical, and proscriptive to other classes never intended to be affected thereby, so that the framers of our constitution, learning from experience, wisely provided that the laws should be general in their nature and uniform throughout the state. The act under consideration, while it is general in its nature, applies only to railroad companies and their employees, and is not, therefore, general in its application, and does not operate uniformly on all classes of citizens." A comparison of this opinion with the one in the Iowa case, *supra*, made a strong decision towards classification in that it upheld a statute which relates only to a certain group of railroad employees, but relates to all railroad companies. See dissenting opinion in *McGuire v. Chicago, B. Q. R. Co.*⁴

(4) *Supra*.

In the absence of statutes, and where such have been declared unconstitutional, the general principle is that stipulations, incorporated in certificates of membership in voluntary relief departments, organized by railroad companies, relieving the companies of all damages, are not against public policy, and invalid for want of consideration or mutuality.⁵ After this brief outline of recent decisions on this question, it may not be out of place to give a cursory review of the law on the general subjects herein involved.

The present problems of legislation, arising from modern economic conditions, which, from the standpoint of magnitude, are unheard of in history, although the fundamental principles underlying these conditions are unchanged, show that the courts and legislatures are grappling with the same problems that confronted legislation in England centuries ago. But then, on account of its peculiar institution, the problems were easily solved, while here, we must struggle to avoid the tendency of falling eventually into the same course of discrimination and classification. As much as we strive to avoid class legislation by steering clear, but at times very close to constitutional safeguards, and as much as we enunciate the doctrine that class legislation, discriminating against some and favoring others, is prohibited, class legislation, in spite of all the refined distinctions, discriminations and differentiations, will slowly invade our institutions. History repeats itself. This truism is equally applicable to its subjective as well as to its objective viewpoint. What may be true in the history of an individual, may be true of a nation. Psychologists maintain that the individual child lives in its mental development through the experiences of the

(5) *Otis v. Pennsylvania Co.* (C. C. A.) 71 Fed. Rep. 136; *Owens v. Baltimore & Ohio R. Co.* (C. C. A.) 35 Fed. Rep. 715. 1 L. R. A. 75; *Donald v. Chicago, B. Q. Ry. Co.*, 93 Iowa, 284. 61 N. W. Rep. 971, 33 L. R. A. 492. *Chicago, B. & Q. R. Co. v. Bell*, 44 Neb. 62 N. W. Rep. 314; *Farrow v. Pittsburg, C., C. & St. L. R. Co.*, 7 Ohio N. P. Rep. 605, 5 Ohio S. & C. P., Dec. 582.

race, so may this be true of the infant nation in its material development—and this even when the nation starts out under the most favorable auspices. One form of its institution may be at a crowning point in that stage of its evolution, but other forms may still be in a lower state of evolution. Among these may be the economic form, resting upon the same fundamental principles as in vogue in older nations, although the political form is improved. It is apparent then that the infant nation will be forced to pass through the same experiences as the older nation, and ultimately arrive at that point where man's ambition and greed will assert itself above all. Contentions will arise between capital and labor, between the strong and weak, and between the rich and poor, fostering a class sentiment, so that frequent clashes of interests occur in the form of strikes, boycotts, lockouts and the like, leading not infrequently to bloodshed. The mistress of the law often unconsciously contributes to bringing about such conditions. Every careful student of the law knows that the law relating to real property became very technical as it developed, while the law in regard to trade developed on broader and more liberal lines. The common law soon accepted and recognized the Roman law maxim, *caveat emptor*—let the buyer beware, but it utterly failed to accept and recognize the Roman law maxim, *caveat venditor*, for the reason that it obstructed the freedom of trade and was too ethical and refined for business purposes. The maxim *caveat emptor* undoubtedly has contributed its share to the creation of a double standard of morals in the business world. A careful study of the different economic conditions created under the law of partnership, of corporations, of combination and trust, will show some peculiar legal features. As an illustration the following will suffice: In some states there are statutes providing that if a corporation commits a public wrong no one can call it to account, except the attorney general of the state, and he only after leave granted by the supreme court, and that

when he makes the application. Before considering the guilt or innocence of the accused, the court will inquire into the motives of the prosecutor, and if found not to the court's liking, the application will be refused and the guilty corporation allowed to escape. Laws of this kind give the genius of finance a free sway for his abilities, and although, exercised for a creative and upbuilding purpose, is not free from selfishness in the attainment of power—the creator of classes. No wonder a man of this type said: "Decision or no decision, the men who own this stock will do with it as they please. The courts decide a great many things about which they know nothing. This is one of them. No court can run our property." This was followed by a trade union passing a resolution stating "that if the roads won't obey the Supreme Court of the United States, why should we pay any attention to the district court?" Although these sentences as voiced by both parties are pernicious and defiant, yet they show that the maxim, all men are equal before the law, has left its earmark, in that, if one need not obey the law, equally so need not the other obey the law, thus giving no expression to class sentiment.

A thorough search through the written and unwritten law of England will reveal no declaration or institution which made all men equal before the law. The framework of the English government is based upon classes, titles, ranks and precedence. Blackstone classifies the nation as follows: Firstly, the royal family; secondly, the highest order of ecclesiastical office; thirdly, the nobility, the order of which, after the royal family, is as follows: Duke, marquis, earl, viscount, baron, baronet, knight, and a lord who is an earl—or else the title is only the courtesy one accorded to the younger sons of dukes; fourthly, the esquires and gentry; fifthly, the yeoman, and lastly, the rest of the commonalty are tradesmen, artificers and laborers.* Statutes were passed

(6) 1 Bl Com. 407.

which further divided the lower orders of people, in consideration of law, into servants, laborers, artificers and beggars. All were subject to different regulations.⁷ These regulations related to all sorts of things, dress, the manner of their enjoyments, the kind of weapons they were allowed to carry, and so forth. The price of labor was adjusted as a police regulation, and by Statute 5 Eliz., chap. 4, persons having no visible livelihood were compelled to go out to labor, and many other regulations were enforced and are still in force.⁸ Passing on to the so-called Truck Act, known in English law as statutes 1 and 2, Wm. IV., chap. 37, which was passed to abolish the Truck system under which employers were in the practice of paying the wages of their work people in goods, or requiring them to purchase goods at certain shops. The result of which was that laborers were compelled to pay high prices for goods of inferior quality. The object of these statutes was to prevent abuses and frauds, and all these statutes, as well as those relating to sanitary regulations, safety regulations for dangerous employment, regulation of morals and regulations for personal comfort and security, passed by parliament, were founded on the common law doctrine of the right of sovereignty to exercise the police power. Many of the historical illustrations show that parliament had to deal with legislative problems identical with those which have confronted one state legislature and congress within the last quarter of a century. Although the elements of the equations of the problems are the same, still the terms and conditions are different in that they are interpreted by more equitable and humane principles.

Statutes have been passed by congress and many of the state legislatures on some of the following subjects relating to transportation of persons and freight, to the manufacture and sale of lard and artificial butter, to the inspection and labelling of

foods, to the measuring and inspection of lumber, grain, tobacco, etc., to insurance of life and property, to the contract for the loan of money, to the establishment of labor bureaus, to preference to claims for labor in the settlement of insolvent estates, to laborer's liens, to employer's liability for personal injuries to employees, to the screening and weighing of coal as a basis of miners' wages, to compulsory payment of wages at frequent or regular intervals, to limiting the hours of labor, to allowing attorneys' fees in actions for the recovery of wages, to forbidding the payment of wages in store orders, or other paper not redeemable in money, to invalidating the assignment of wages before they were earned, to allowing double damages in certain cases of negligence, to employer's liability for personal injuries to fellow servants, to wages of seamen, to the employment of children, to the employment of women, etc. In speaking of statutes of this class, the court said, in *McGuire v. Chicago, B. & A. R. Co.*:⁹ "The volume and variety of such legislation is rapidly increasing. Some of these experiments may be crude and of doubtful expediency; and others may be marred by fatal defects, but the general movement of which they mark the progress is proof of the urgency of the demand for an adjustment of the law to meet new and unprecedented conditions. It is true that some of these measures have been invalidated in certain jurisdictions as unconstitutional, while in others they are sustained. Indeed, it is not strange that in dealing with untried conditions legislatures should have occasionally exceeded their constitutional power, nor is it strange if courts in their conservatism should sometimes have failed to give due consideration to the thought that radical changes in circumstances affecting the public welfare may justify the application of remedies which, under former conditions would have been rightfully held arbitrary and unreasonable." In illustration of some of the various statutes that have been

(7) Statutes of Rich. II.

(8) Brown & H. Com. 511 and notes.

(9) 108 N. W. Rep. 902.

held valid, the following will amply show the trend of judicial decisions. A statute requiring employers of labor who issue store orders or scrip in payment for labor to redeem the same in money if demanded, held valid.¹⁰ An act prohibiting the acceptance of merchandise orders in payment of wages instead of money held valid.¹¹ An enactment requiring wages paid at regular periods and intervals declared not unconstitutional.¹² Held valid an act limiting a day's work to eight hours.¹³ The validity of statute sustained which prohibits the assignment of claims for wages not yet earned.¹⁴ Where a statute of the United States makes it unlawful to pay any seaman wages in advance, or to pay such wages to any other person on a seaman's account, and providing that such payment in advance shall not absolve the employer from full payment after the wages have been earned is held valid.¹⁵ So a statute was sustained which invalidated contracts to waive homestead and exemption laws.¹⁶ A provision prohibiting all sales of corporate stock to be delivered in the future, in-

cluding in its prohibition bona fide as well as gambling transactions was held valid.¹⁷ The validity of a statute was sustained requiring the words, "given for a patent," to be inserted in promissory notes given upon such consideration.¹⁸ And so a statute prohibiting parties from contracting to pay attorney's fees for the collection of a claim against them.¹⁹ Where statutes allowing plaintiffs only to recover attorney's fees as part of the judgment in particular actions selected by legislature, the court has held them valid.²⁰ A statute was sustained subjecting railroad companies to double damages for injuries done due to failure to fence their rights of way.²¹ So a statute which forbids a railway employee to contract to assume the risk of a hazardous appliance or unsafe place to work, held valid.²²

(17) *Otis v. Parker*, 187 U. S. 606, 23 Sup. Ct. Rep. 168, 47 L. Ed. 323.

(18) *New v. Walker*, 108 Ind. 365, 9 N. E. Rep. 386, 58 Am. Rep. 40; *Herdie v. Roener*, 109 N. Y. 127, 16 N. E. Rep. 198.

(19) *Churchmen v. Martin*, 54 Ind. 380.

(20) *Kansas P. R. Co. v. Mower*, 16 Kan. 573; *Peoria, D. and E. R. Co. v. Deggan*, 109 Ill. 537, 50 Am. Rep. 619; *Vogel v. Pekow*, 157 Ill. 339, 42 N. E. Rep. 386, 30 L. R. A. 491; *Dow v. Beidelman*, 49 Ark. 455, 5 S. W. Rep. 748; *Perkins v. St. Louis, I. M. & S. R. Co.*, 103 Mo. 52, 15 S. W. Rep. 320, 11 L. R. A. 426; *Burlington, C. R. & N. R. Co. v. Dey*, 82 Iowa, 312, 48 N. W. Rep. 98, 3 Inters. Com. Rep. 584, 12 L. R. A. 436, *Wortman v. Kleinschmidt*, 12 Mont. 316, 30 Pac. Rep. 280; *Gulf C. & S. F. R. Co. v. Ellis*, 87 Tex. 19, 26 S. W. Rep. 985; *Cameron v. Chicago, M. & St. P. R. Co.*, 63 Minn. 384, 65 N. W. Rep. 652, 31 L. R. A. 553; *Atchison T. & S. F. R. Co. v. Matthews*, 174 U. S. 96, 43 L. Ed. 611, 19 Sup. Ct. Rep. 609. Contra. *Hocking Valley Coal Co. v. Roser*, 53 Ohio St. 12, 41 N. E. Rep. 264, 29 L. R. A. 386; *Wilder v. Chicago & W. M. R. Co.*, 70 Mich. 382, 38 N. W. Rep. 289; *St. Louis, I. M. & S. R. Co. v. Williams*, 49 Ark. 492, 5 S. W. Rep. 885; *Jolliffe v. Brown*, 14 Wash. 155, 44 Pac. Rep. 149; *Grand Rapids Chair Co. v. Runnels*, 77 Mich. 104, 4 N. W. Rep. 1006; *South and North Ala. R. Co. v. Morris*, 65 Ala. 193; *Gulf, C. & S. F. R. Co. v. Ellis*, 165 U. S. 150, 41 L. Ed. 666, 17 Sup. Ct. Rep. 255; *Chicago, St. Louis & N. O. R. Co. v. Moss*, 60 Miss. 641; *Durkee v. Jonesville*, 28 Wis. 464, 9 Am. Rep. 500.

(21) *Missouri P. R. Co. v. Mackey*, 127 U. S. 205, 32 L. Ed. 107, 8 Sup. Ct. Rep. 1161; *Minneapolis & St. Louis R. Co. v. Emmons*, 147 U. S. 364, 37 L. Ed. 769, 13 Sup. Ct. Rep. 370; *St. Louis & S. F. R. Co. v. Mathews*, 165 U. S. 26, 41 L. Ed. 621, 17 Sup. Ct. Rep. 213.

(22) *Kilpatrick v. Railroad Co.*, 74 Vt. 288, 52 Atl. Rep. 531, 93 Am. St. Rep. 887.

(10) *Harblson v. Iron Co. (Tenn.)*, 53 S. W. Rep. 955, 56 L. R. A. 316, 76 Am. St. Rep. 682.

(11) *State v. Peel Splint Coal Co.*, 36 W. Va. 802, 15 S. E. Rep. 1000, 17 L. R. A. 386; *Avent Beattyville Coal Co. v. Com.*, 96 Ky. 218, 28 S. W. Rep. 502, 28 L. R. A. 273. Contra. *Godcharles v. Wigman*, 113 Pa. 431, 6 Atl. Rep. 354, *Showalter v. Ehlen*, 5 Pa. Supr. Ct. 242; *State v. Loomis*, 116 Mo. 307, 22 S. W. Rep. 350, 21 L. R. A. 789.

(12) *Re House Bill No. 1230*, 40 N. E. Rep. 713, 28 L. R. A. 344; *State v. Brown & S. Mfg. Co.*, 18 R. I. 16, 25 Atl. Rep. 346, 17 L. R. A. 856; *Shaffer Union Mine Co.*, 35 Md. 74; *Hanarch v. Yates*, 121 Ind. 366, 23 N. E. Rep. 253, 6 L. R. A. 576. Contra. *Braceville Coal Co. v. People*, 147 Ill. 66, 35 N. E. Rep. 62, 22 L. R. A. 340.

(13) *Holden v. Hardy*, 169 U. S. 366, 42 L. Ed. 780, 18 Sup. Ct. Rep. 383. Contra. *Ritchie v. People*, 155 Ill. 98, 40 N. E. Rep. 454, 29 L. R. A. 79; *Low v. Rees Printing Co.*, 41 Neb. 127, 59 N. E. Rep. 362, 24 L. R. A. 702.

(14) *International Co. v. Weissinger*, 160 Ind. 349, 65 N. E. Rep. 521, 65 L. R. A. 597, 98 Am. St. Rep. 334.

(15) *Patterson v. Endora*, 190 U. S. 169, 23 Sup. Ct. Rep. 821, 47 L. Ed. 1002.

(16) *Curtis v. O'Brien*, 20 Iowa, 376, 89 Am. Dec. 543; *Knutth v. Newcomb*, 22 N. Y. 249, 78 Am. Dec. 186; *Maloney v. Newton*, 85 Ind. 365, 44 Am. Rep. 46, and a debtor is not allowed to waive a stay of execution by contract. *McLane v. Elmer*, 4 Ind. 239.

The purpose of these statutes are to protect the poor and helpless, to protect the weak against the strong, to equalize the relation between employer and employee, to protect all against fraudulent devices, and to prevent abuses, frauds, oppressions and undue advantages. In *Kilpatrick v. Railroad Co.*²³ the court said: "The act we are considering was an attempt to better the condition of that class by compelling the employers to yield something of profit in the interest of humanity, and to save the lives and limbs of his workmen by adopting safe instruments of labor. It seems to us that a court should be very slow to construe the beneficial purpose out of such law, or to make it of no effect. On broad lines of public good and social progress it is plain that such legislation must be largely looked to if government is to remain firm and secure in the respect and affection of the people." Speaking of labor legislation in *McGuire v. Chicago, B. & Q. R. Co.*, *supra*, the court said: "The relations between employer and employee are, and always have been recognized as proper subjects of police regulation, but recent years, with the extraordinary changes wrought in industrial affairs, have given that phase of our law peculiar prominence. New social and economic conditions have demanded and received the attention of law makers and courts. Employers and employees do not stand in the same relative positions which they occupied before the various lines of industry because concentrated in comparatively few hands, and before workers were marshaled into such vast armies that employers must, of necessity, deal with them in masses, rather than as individuals. These changes have not been accomplished without serious friction between wage payers and wage earners. Where the blame or responsibility rests is not for us to consider. The condition has existed, and still exists, and neither legislature nor courts can, with propriety, ignore. In every industry employing any considerable

amount of labor, the employees are organized for associated effort, seeking to maintain or increase labor's share of the wealth it assists in producing. Employers are likewise organized to check or offset the power and influence of associated labor. Strikes and lockouts are by no means uncommon, and no year goes by when some one or more of these contests does not assume formidable proportions, disturbing the peace and good order of society and inflicting injury of a most serious nature upon all lines of business. The tying up for a single day of a single railroad system is attended by grave inconvenience, and loss to the public, while anything like a general suspension of traffic is productive of immediate and widespread calamity. So close and vital is the dependence of the public welfare upon harmony between labor and capital that the legislature may well exercise a liberal discretion in the enactment of measures to suppress and guard against every influence which tends to promote discontent or discord between them. This truth has already challenged general attention, and has found expression in the statutes and court decisions of every state of our union."

At common law, under English rule, the right of the sovereignty to exercise the police power was not restricted in the sense that it is under American law. As said before, the elements of the equation are the same, but the terms and conditions were different, in so far as they are to be interpreted by more equitable and humane principles. These principles are that all men are equal before the law, that the "law of the land" must operate equally upon all persons, that the enjoyment of liberty and the freedom of contract must not be impaired, nor the means of acquiring and possessing property interfered with, unless by due process of law. The application of these general principles are the means by which the exercise of the police power is to be interpreted. In interpreting the police power as applicable to the statutes on labor questions,

(23) 74 Vt. 288, 52 Atl. Rep. 531, 93 Am. St. Rep. 887.

the principles relating to the law of the land and the liberty of contract have been more frequently invoked, and for that reason these subjects will be more particularly treated here. The general doctrine may be enunciated as a tentative one, i. e., that the general process by which the relation of these principles to the exercise of the police power as affecting the validity of these statutes is one of judicial inclusion and exclusion as cases may arise.

The law of the land, when applied to general legislation, was defined to mean a general and public law equally binding upon every member in the community, but this has been qualified to mean a law embracing all persons who are, or may come, into like situations and circumstances. The general doctrine is well settled that class legislation, discriminating against some and favoring others is prohibited, but the legislature has power to classify subjects of legislation, conferring rights or imposing duties, according to its views of which is just and expedient, and will promote the general welfare, subject, however, when carrying out the public purpose, only to the limitations that the classification be natural and reasonable, not arbitrary and capricious, and that within the sphere of its operation, it affects all persons similarly situated.²⁴

In *Harwood v. Wentworth*,²⁵ where the question was whether an act of the legislature of Arizona fixing the compensation of county officers, and for that purpose, classifying the counties of the state according to assessed valuation of property in each county, was a local or special act. If so, it was void, as repugnant to an act of Congress declaring that the legislators of the territory shall not pass local or special laws in certain cases. The practical effect of the act was to establish higher salaries for the particular officers named in some counties than for the same class of officers in other counties. The supreme court said: "That does not make it a local or special law. The act is general in its operation; it applies to all counties in the territory; it prescribes a rule for the state compensation of certain public officers, no officer of the classes named is exempted from its operation; and there is such a relation between the salaries fixed for each class of counties and the equalized assessed valuation of property in them, respectively, as to show that the act is not local and special, but is general in its application to the whole territory, but designed to establish a system compensating county officers that is not intrinsically unjust, nor capable of being applied for purposes merely local and special." In *Adler v. Whitlock*,²⁶ the statute included only saloons, and ex-

(24) *Knoxville Iron Co. v. Harblison*, 183 U. S. 13, which affirmed *Harblison v. Iron Co.*, 53 S. W. Rep. 955, 56 L. R. A. 316, 76 Am. St. Rep. 682; *Stratton Claimants v. Morris Claimants*, 89 Tenn. 521, sub. nom. *Debwell v. Lanier*, 15 S. W. Rep. 87, 12 L. R. A. 15; *Sutton v. State*, 96 Tenn. 703, 36 S. W. Rep. 697, 33 L. R. A. 587; *Kenley v. State*, 98 Tenn. 698, 41 S. W. Rep. 352, 39 L. R. A. 126; *Knoxville & O. R. Co. v. Harris*, 99 Tenn. 705, 43 S. W. Rep. 115, 53 L. R. A. 921, *Iowa Railroad Land Co. v. Loper*, 39 Iowa, 112; *Barbler v. Connolly*, 113 U. S. 27, 28 L. Ed. 923, 5 Sup. Ct. Rep. 357; *Doppe v. Chicago, R. I. & P. R. Co.*, 38 Iowa, 52; *St. Louis, I. M. & S. R. Co. v. Paul*, 173 U. S. 404, 43 L. Ed. 746, 19 Sup. Ct. Rep. 410, *McAnnich v. Mississippi & M. R. Co.*, 20 Iowa, 338, *Wagoner v. Loomis*, 37 Ohio St. 571; *Adler v. Whitlock*, 44 Ohio St. 539, 9 N. E. Rep. 672; *State v. Nelson*, 52 Ohio St. 88, 101, 39 N. E. Rep. 22, 6 L. R. A. 817; *State ex rel. Poe v. Jones*, 51 Ohio St. 493, 37 N. E. Rep. 945; *Cincinnati v. Steinkamp*, 54 Ohio St. 285, 290, 43 N. E. Rep. 490; *Hagerty v. State*, 55 Ohio St. 613, 45 N. E. Rep. 1046; *France v. State*, 57 Ohio St. 1, 47 N. E. Rep. 1041; *State*

v. Gardner, 58 Ohio St. 599, 51 N. E. Rep. 136; 41 L. R. A. 689, 65 Am. St. Rep. 785. *State ex rel. Taylor v. Gullbert*, 70 Ohio St. 229, 250, 71 N. E. Rep. 636; *Fidelity & C. Co. v. Freeman*, 48 C. C. A. 692, 127 Fed. Rep. 847, 855, 54 L. R. A. 680; *Missouri P. R. Co. v. Mackey*, 127 U. S. 205, 32 L. Ed. 107, 8 Sup. Ct. Rep. 1161; *Minneapolis, St. L. & R. Co. v. Herrich*, 127 U. S. 210, 32 L. Ed. 109, 8 Sup. Ct. Rep. 1176; *Minneapolis & St. L. R. Co. v. Beckwith*, 129 U. S. 26, 32 L. Ed. 585, 9 Sup. Ct. Rep. 207; *Chicago K. & W. R. Co. v. Pontius*, 157 U. S. 2091, 39 L. Ed. 675, 15 Sup. Ct. Rep. 585; *Gulf, C. & S. F. R. Co. v. Ellis*, 165 U. S. 150, 40 L. Ed. 666, 17 Sup. Ct. Rep. 255. *Magoon v. Illinois Trust & Sav. Bank*, 170 U. S. 283, 42 L. Ed. 1037, 18 Sup. Ct. Rep. 594; *Orient Ins. Co. v. Doggs*, 172 U. S. 557, 43 L. Ed. 552, 19 Sup. Ct. Rep. 28. *Tullis v. Lake Erie & W. R. Co.*, 175 U. S. 348, 44 L. Ed. 192, 20 Sup. Ct. Rep. 136.

(25) 162 U. S. 547, 40 L. Ed. 1069, 1074, 16 Sup. Ct. Rep. 890.

(26) 44 Ohio St. 539, 9 N. E. Rep. 672.

cluded distillers and brewers, held valid. So in *Senior v. Rotterman*,²⁷ where wholesale dealers and manufacturers were not included in the same class, the statute was sustained. In speaking of a uniform operation throughout the state of all laws of a general nature in the case of *McGill v. State*,²⁸ the court said: "A general law that land should not be sold upon execution for less than two-thirds of its appraised value, was excluded from operation in several counties by local enactment. There were different laws in different counties respecting the descent and distribution of interstate property. Some statutes defined legal offenses, and were excluded in their operation from a large part of the state, and different penalties for a violation of the same act were, in some instances, provided for in different localities. These are examples of the legislation to prevent which in the future, and the mischief resulting from it, this provision of the constitution was adopted. But no wider scope was claimed for it than to guard the future against the evils and inequalities resulting from legislation of the character complained of."

Natural persons have certain inalienable rights, for which they are not indebted to organized society. They are born to them. The liberty of contract is one of these inalienable rights, yet such liberty is not absolute and universal. It may be limited. The general doctrine undoubtedly is that it is within the power of the government to restrain some individuals from all contracts, and all individuals from some contracts. The reason for this is founded on public policy.²⁹ But corporations are more susceptible to the power of the government to the regulation of the liberty of contract than individuals, for corporate persons have no other rights than those with which they are clothed by the power that created them. The doctrine in such cases is that the pow-

er of creation necessarily implies the power of regulation.³⁰ In *Kilpatrick v. Railroad Co.*,³¹ the court said: "If it be objected that the statute, when thus read, deprives the laborer of his right to make his own contracts, the answer is to be founded in the principle that the state has the right to protect its poor and helpless, even to that extent, if need be. Such is the basis of the decisions that upheld the Utah labor law restricting the hours of mining work to eight hours per day, statutes that forbid the employment of children in certain callings, the store order acts, and the statute against usury in defense of the last named of which this court held, some twenty years ago, that even a release under seal given by the borrower at the time of the loan did not bar his right to recover the unlawful rate, declaring that the statute was intended for the protection of the weak against the strong, and public policy requires that it should not be evaded, nor its force abated. Everybody knows that there are large classes who get their living from day to day in such service as that in which plaintiff was engaged, who must work where they are working and keep their job at all hazards, if they would not bring themselves and their families to want. To say to such, 'If you do not like the conditions, you may quit,' is often only a heartless mockery."

The police power is subject to constitutional limitations, both state and federal. The maxim upon which the police power is founded is: "So use your own property and rights as not to injure those of others, or those of others collectively constituting the state." The legislative power whereby this maxim is enforced is called the police power. This power, as defined by our constitutional law, is simply the power to enforce such restrictions upon private rights, as are practically necessary for the

(27) 44 Ohio St. 661, 11 N. E. Rep. 321.

(28) 34 Ohio St. 238.

(29) *Patterson v. Endra*, 190 U. S. 169, 47 L. Ed. 1002, 23 Sup. Ct. Rep. 821.

(30) *Railroad v. Bristol*, 151 U. S. 556, 38 L. Ed. 269, 14 Sup. Ct. Rep. 437; *Railroad v. Paul*, 173 U. S. 404, 43 L. Ed. 746, 19 Sup. Ct. 419.

(31) 74 Vt. 288, 52 Atl. Rep. 531, 93 Am. St. Rep. 887.

general welfare of all.³² The legislature has a large discretion in the exercise of this power, for it is presumed to know, not only what the welfare of the public requires, but also what measures are necessary for its advancement. As to the limitations upon this power, the legislature is presumed to judge them correctly. This presumption is only questioned where the particular law in question transcends such limitations. The general doctrine is that the scope of its exercise, within the bounds of enacting and enforcing all such laws as may rightly be deemed necessary or expedient for the safety, health, morals, comfort, and welfare of the people, is limited only by the requirement that it shall not arbitrarily or unreasonably affect the individual in his life, liberty or property.³³ The principle as to the relation of legislative classification to the police power is that the classification shall not be limited to matters connected with the police power, but may be exercised in all cases where public welfare, interests, and substantial justice require.³⁴ The exercise of the police power as to the liberty of contract must be rea-

sonable and just. It cannot be oppressive and arbitrary. In the conclusion of the opinion in the case of *Holden v. Hardy*,³⁵ the court mentioned the disadvantage of the employee in the matter of contracting, and justified the state's interference for his protection, and in doing so, said: "The legislature has also recognized the fact, which the experience of legislators in many states has corroborated, that the proprietors of these establishments and their operators do not stand upon an equality, but that their interests are, to a certain extent, conflicting. The former naturally desire to obtain as much labor as possible from their employees, while the latter are often induced, by the fear of discharge, to conform to regulations which their judgment, fairly exercised, would pronounce to be detrimental to their health or strength. In other words, the proprietors lay down the rules, and the laborers are practically constrained to obey them. In such cases self-interest is often an unsafe guide, and the legislature may properly interpose its authority." The general principles in cases of this class may be stated as follows: That where there is a disadvantage and inequality in the contractual relations between the parties so that the conditions may be imposed by one party without any power of choice on the part of the other party the legislature may invoke its police power to regulate these relations with a view to ameliorating them, and to prevent fraud, oppression and undue advantage.³⁶

The general principle is that a statute will not be declared unconstitutional, except when it violates such instrument "so clearly, palpable and plainly," as to leave no reasonable doubt.³⁷ and every possible presumption is in favor of the validity of a statute, and this continues until the contrary is shown beyond a rational doubt.³⁸

(32) *State v. Wagener*, 77 Minn. 483, 80 N. W. Rep. 623, 778, 1134, 77 Am. St. Rep. 681, 46 L. R. A. 442.

(33) *Davidson v. New Orleans*, 96 U. S. 97, 24 L. Ed. 616; *Yick Wo v. Hopkins*, 118 U. S. 356, 30 L. Ed. 220, 6 Sup. Ct. Rep. 1064; *Lamson v. Steele*, 152 U. S. 136, 38 L. Ed. 385, 14 Sup. Ct. Rep. 499. *Kidd v. Pearson*, 128 U. S. 1, 32 L. Ed. 346, 2 Inters. Com. Rep. 232, 2 Sup. Ct. Rep. 6; *Slaughter House Cases*, 16 Wall. 36, 21 L. Ed. 394. *Smith v. Turner*, 7 How. 457, 12 L. Ed. 813; *New York v. Milan*, 11 Pet. 139, 9 L. Ed. 662; *Butchers' Union S. H. & L. S. Co. v. Crescent City L. S. L. & S. H. Co.*, 111 U. S. 746, 28 L. Ed. 585, 4 Sup. Ct. Rep. 652; *Bowman v. Chicago & N. W. Co.*, 125 U. S. 465, 31 L. Ed. 700, 1 Inters. Com. Rep. 823, 8 Sup. Ct. Rep. 689, 1062; *Reelfoot Lake Levee Dist. v. Dawson*, 97 Tenn. 172, 36 S. W. Rep. 1041, 34 L. R. A. 725; *Smith v. State*, 110 Tenn. 494, 46 S. W. Rep. 566; 41 L. R. A. 432; *Austin v. State*, 101 Tenn. 507, 48 S. W. Rep. 305, 50 L. R. A. 478.

(34) *McAnnich v. Mississippi & M. R. Co.*, 20 Iowa, 338; *Jones v. Galena & C. Union R. Co.*, 16 Iowa, 6; *Mackie v. Central R. Co.*, 54 Iowa, 540; *Farmers' & M. Ins. Co. v. Dabney* (Neb.), 86 N. W. Rep. 1070; *Minneapolis & St. L. R. Co. v. Beckwith*, 129 U. S. 26, 32 L. Ed. 585, 9 Sup. Ct. Rep. 207; *Missouri P. R. Co. v. Mackey*, 127 U. S. 205, 32 L. Ed. 107, 8 Sup. Ct. Rep. 1161; *St. Louis & S. F. R. Co. v. Mathews*, 165 U. S. 1, 41 L. Ed. 611, 17 Sup. Ct. Rep. 243.

(35) *Supra*.

(36) *Peel Splint Coal Co. v. West Virginia* (W. Va.), 17 L. R. A. 385.

(37) *McGuire v. Chicago, B. & Q. R. Co.* (Iowa), 108 N. W. Rep. 902.

(38) *Sinking Fund Cases*, 99 U. S. 700, 25 L. Ed. 496.

In conclusion, it may be said that almost all the cases cited here upon these various subjects relate to the constitutionality of some statute, and further it may be noted that a careful study of the leading cases³⁹ will prove profitable in the light of modern economic developments.

F. A. BEECHER.

Detroit, Mich.

(39) *Harbison v. Iron Co.* (Tenn.), 53 S. W. Rep. 955, 56 L. R. A. 316, 76 Am. St. Rep. 682, affirmed in 183 U. S. 13; *Munn v. Illinois*, 69 Ill. 80, affirmed in 94 U. S. 113, 24 L. Ed. 77; *Holden v. Hardy*, 169 U. S. 392, 42 L. Ed. 791, 18 Sup. Ct. Rep. 382; *Railroad v. Matthew*, 165 U. S. 1, 17 Sup. Ct. Rep. 243, *State v. Nelser*, 52 Ohio St. 88, 39 N. E. Rep. 22, 26 L. R. A. 317; *Peel Splint Coal Co. v. West Virginia*, W. Va., 17 L. R. A. 385; *McGuire v. Chicago, B. & Q. R. Co.*, 108 N. W. Rep. 902. *Contra Gulf C. & S. F. R. Co. v. Ellis*, 165 U. S. 150, 41 L. Ed. 666, 17 Sup. Ct. Rep. 283; *Shaver v. Pennsylvania Co.*, 71 Fed. Rep. 931; *Otis v. Pennsylvania Co.* (C. C. A.) 71 Fed. Rep. 136.

CORPORATIONS—CREDITORS' SUIT—WHEN MAINTAINABLE—FOREIGN CORPORATION DEFENDANT.

LEHR v. MURPHY.

Supreme Court of Wisconsin, June 5, 1908.

A creditor's action may be maintained in the courts of this state against a foreign corporation to conserve its property within the jurisdiction of such court for the payment of claims of creditors properly invoking such jurisdiction as in case of a domestic corporation.

It is not essential to the commencement of a creditor's action against a corporation that there be a receiver appointed.

In case of the commencement of a creditor's action to conserve the property of a corporation for the benefit of creditors, if a creditor plaintiff is so circumstanced as to be competent to so invoke the court's jurisdiction other creditors not so circumstanced may be joined, and if a receiver appointed before the commencement of the action be also joined, whether the appointment be regular or not is immaterial, it being sufficient if there be one creditor plaintiff competent as aforesaid.

Defendant Standard Lead & Zinc Smelting & Mining Company is a corporation organized under the laws of the territory of Arizona February 24, 1905, with an authorized capital of one million shares of the par value of \$1 each. Its designated office and principal place of business is and always has been in the city of Milwaukee, Wis. Since June 5, 1905, defendants Murphy, Zien, McKinney, Davidor, Evans and Van Wyck, all being residents of said city, except Zien, who resides at Duluth, Minn., and McKinney, who resides at Pittsburgh, Pa., have been its directors. April 23,

1906, plaintiff Field, in a justice court of La Fayette county, Wis., procured a judgment against said corporation for \$134.82, upon which execution was duly issued out of the circuit court for said county and returned wholly unsatisfied. Thereafter plaintiff Lehr was duly appointed by the county court of said county receiver of the property of said corporation and he duly qualified and by due proceedings was authorized to bring this action. Plaintiffs Rosenberg and Meske are stockholders of the corporation, and as well as plaintiff Field, are creditors thereof, and have been duly joined as plaintiffs in their own behalf and in behalf of all other creditors of the corporation who may wish to participate in the action.

All the business of the corporation has been done in the state of Wisconsin and all of its effects are located therein. This action is brought for the sole purpose of compelling the defendant's directors to pay such sums as they ought to pay, and for the satisfaction of the debts of the corporation. The proceedings of such directors hereafter mentioned were in violation of the law of the territory of Arizona and the law of the state of Wisconsin. The corporation is possessed of effects in the state of Wisconsin held in secret trust for it by some of the defendants, the evidence of which is under their control and in respect to which discovery is sought. The corporation is insolvent, owing debts far in excess of its assets. The individual defendants by collusion permitted defendant Davidor, or a corporation controlled by him, to acquire from the defendant corporation three-quarters of its capital stock in exchange for a mining lease and property obtained by him and in which he had not made any investment, the corporation assuming all obligations in that regard and so taking the property at such a fictitious value as really to not realize any consideration for the stock. The proceedings in respect to that matter were thereafter ratified at a meeting of the directors, all being present except McKinney. All except him personally knew of the entire transaction.

Said directors fraudulently entered into an arrangement with Davidor and his corporation to allow the latter as sole agent for the sale of the corporate stock a commission of 50 per cent. of all sums received for said stock, and they fraudulently entered into a further agreement whereby one-half of such stock was divided into seven portions and one such portion was turned over to each director for \$100, except Evans, who paid \$500, and McKinney, who paid \$5,000, and the seventh portion was divided equally between Davidor and Zien, each paying \$50. Pursuant to said fraudulent arrangement as to the division of stock and allowance of commission, one-half of the \$6,000, received by

the corporation aforesaid was paid to Davidor's corporation. The scheme aforesaid, among other things, was entered into to make it appear to prospective purchasers of stock at second-hand that the defendant corporation had received \$500,000 for one-half of its stock. As a part of the arrangement to allow 50 per cent. commission for the sale of stock, Davidor, or his corporation, returned one-third of the stock received for the mining lease and property aforesaid and the same formed a part of the stock distributed as aforesaid.

The individual defendants owned the stock acquired by them as aforesaid at the time the indebtedness to plaintiff Field was incurred and they still own the same, never having paid therefor except as indicated. The contract allowing 50 per cent. commission for selling the corporate stock was fraudulently kept secret from general stockholders. The defendant's directors negligently and fraudulently squandered the property of their corporation so crippling it as to cause other losses, aggregating in all \$100,000, and they fraudulently paid two dividends amounting to \$1,816.46, there being no net profits out of which to pay the same.

The prayer for relief is broad enough for an ordinary creditor's action and also for a general winding up suit as in case of the final and full settlement of the affairs of an insolvent corporation.

The demurrer was upon the following grounds:

- (1) Want of jurisdiction of the person of the defendant or of the subject of action.
- (2) Want of legal capacity to sue.
- (3) Improper joinder of causes of action.
- (4) Defect of parties plaintiff and defendant and improper joinder of the corporation as defendant.
- (5) Want of facts sufficient to constitute a cause of action.

MARSHALL, J. (after stating the facts as above): Only the first and fifth grounds of demurrer are argued in the briefs of counsel for respondent. Therefore the other grounds will be regarded as abandoned, though we will say, in passing, that viewing the complaint as for a mere creditor's action we are unable to perceive any support for either of the grounds not argued. Regardless of the general nature of the complaint and of the prayer for relief, the dominant purpose of the pleader is unmistakably stated in the allegation that the action is brought "for the sole purpose of compelling payment from the said defendant directors of the amounts that may be found due from them by reason of the matters and things hereinbefore set forth, and for the satisfaction of the debts of all creditors of said defendant corporation."

The main ground of demurrer on which respondent's counsel rely is the fifth. Viewing the complaint only as an ordinary creditor's bill, such ground is readily seen to be untenable. The facts alleged amply show the existence of nonleviable corporate assets of various kinds to be recovered into the corporate treasury or some proper representative thereof for the benefit of creditors. There is the allegation that the defendant's directors are possessed in secret trust of corporate property, the allegations to the effect that contrary to the law of Arizona such directors obtained large amounts of corporate stock from the corporation without rendering thereto any substantial consideration therefor, allegations to the effect that by connivance of the directors half of the stock was issued and turned out for property of no considerable value as compared with the par value of the stock, and further allegations to the effect that by nonfeasance and misfeasance such directors squandered, lost and misappropriated property of the corporation to the extent of over \$100,000. Most of these wrongdoings are alleged to have been participated in by all of the directors.

The fact that two creditors, joined as plaintiffs, are not shown to have exhausted their remedy at law to collect their claims is referred to as a defect in the complaint.

That is immaterial since the leading creditor who joined in initiating the litigation is shown to have exhausted his such remedy and so was competent to commence the suit. The rule is that if in a suit of this sort, at the time of the commencement, there is an active party plaintiff so circumstanced as to be competent to maintain it, he may afterwards be displaced by another creditor, not so circumstanced, and made a defendant, or dropped out of the litigation altogether, or have other creditors, none of whom could have properly initiated the proceedings, joined with him as plaintiffs, without affecting the cause of action or the legal capacity of the parties to pursue the matter. *Harrigan v. Gilchrist*, 121 Wis. 127-307, 99 N. W. Rep. 909.

It is suggested as a defect that the complaint fails to show the receiver was regularly appointed. On that it is sufficient to say that whether such be the case or not is immaterial to the cause of action. No receiver is necessary in order to commence an action of this sort. It is sufficient, as indicated, that there was a creditor competent to make the complaint, who was made a plaintiff. *Harrigan v. Gilchrist*, 121 Wis. 127-271, 99 N. W. Rep. 909.

It is further suggested that the complaint fails to show the issuance and return unsatisfied of a valid execution. The opinion of the court is otherwise. The allegation that an execution was duly issued and was duly returned wholly unsatisfied is ample. By reasonable inference that suggests that a transcript of the justice's judgment was properly filed and the judgment docketed in the office of the clerk of the circuit court before the execution was issued. Under our practice many mixed matters of law and fact are properly pleadable according to the legal effect of the facts. *Hyman v. Landry* (unreported) 116 N. W. Rep. 236 decided May 8, 1908. The rule covers the case, that all facts necessary to sustain a complaint, reasonably inferable from the language used are to be regarded as efficiently stated. *Morse v. Gilfan*, 16 Wis. 504; *Emerson v. Nash*, 124 Wis. 369, 102 N. W. Rep. 921, 70 L. R. A. 326, 109 Am. St. Rep. 944.

The further point is made that the complaint is fatally defective for failure to allege in compliance with Circuit Court Rule 27, § 1 (150 Fed. xxxiv, 79 C. C. A. xxxiv), the true sum actually and equitably due on the judgment. That is ruled in favor of the appellants by *Marston v. Dresen*, 76 Wis. 418, 45 N. W. Rep. 110, and *Faber v. Matz*, 86 Wis. 370, 57 N. W. Rep. 39. The complaint states that the execution upon the judgment was returned wholly unsatisfied; that there is no collusion between the parties and that the action is prosecuted for the sole purpose of compelling payment of dues to the corporation for the satisfaction of its debts. Such allegations were held in the cases cited to substantially comply with the rule; and further that the allegation required thereby is not of the substance of the cause of action which is complete without it and that at best absence thereof is a mere irregularity to be remedied by motion; that it does not constitute any legitimate ground for a demurrer.

In support of the contention that the circuit court has no jurisdiction of the subject of the action it is urged that the statute in respect to dealing with collecting and distributing the effects of insolvent corporations in payment of its debts is governed by section 3216, St. 1898, and its associate sections and that as they relate only to domestic corporations the common law in respect to the matter does not apply; that there is no remedy by a creditors' bill as to a foreign corporation. That is a mistake. It was early decided by this court that the common law respecting creditors' bills is supplemented not displaced by the statutes. *Adler v. Mil-*

waukee P. B. Mfg. Co., 13 Wis. 57; *Harrigan v. Gilchrist*, 121 Wis. 127-245, 99 N. W. Rep. 909.

In the last case cited the court reviewed at length the law on this subject, quoting, as the initial holding here from *Adler v. Milwaukee P. B. Mfg. Co.*, supra, this language:

"From this view of the general powers of courts of equity to manage and control the affairs of failing and bankrupt corporations it becomes a matter of very little practical importance whether * * * sections 18 and 19 of chapter 148 of the Revision of 1858 (now section 3216, St. 1898) are operative or not. If operative they are in affirmance of the law as it was previously understood; if inoperative, no substantial change is occasioned. If they can be enforced, they only go to strengthen the powers which courts of equity heretofore possessed, to remove doubts, and to render the rules by which such proceedings are governed more stable and undeviating."

Further it is contended in support of the demurrer that the circuit court is without jurisdiction of the subject of the action; that a winding up action against a corporation can only be brought at the domicile of the corporation, referring to such cases as *Hutchinson v. American Palace-Car Co.* (C. C.) 104 Fed. Rep. 182, *Stockley v. Thomas*, 89 Md. 663, 43 Atl. Rep. 766, *Condon v. Mutual Reserve Ass'n*, 89 Md. 99, 42 Atl. Rep. 944, 44 L. R. A. 149, 73 Am. St. Rep. 169, and that neither such an action nor one to regulate the internal affairs of a corporation organized under the laws of another state can be maintained except at the domicile of the corporation, referring to such cases as *Northe State Copper & Gold Mining Co. v. Field*, 64 Md. 154, 20 Atl. Rep. 1039, which was essentially an action of that character. It is sufficient to say as to such contentions that the primary purpose, at least, of this action is merely to conserve corporate assets within the jurisdiction of the court for the benefit of creditors in, or that may come into, such jurisdiction. It is neither a winding up action nor an action to regulate the internal affairs of the corporation. If there be any matters stated in the complaint appropriate to such actions they are merely incidental to the main purpose of the suit. As the court at present is not required to go further than to test the question of whether the complaint states facts sufficient for a creditors' bill the two propositions suggested by counsel and argued at considerable length need not be discussed.

A clear distinction is made in the authori-

ties between an action of this sort and a general winding up action or one to regulate the internal affairs of a corporation. In *Hutchinson v. American Palace-Car Co.*, *supra*, confidently relied upon by counsel, it is distinctly held that any state may take control of property lying within its jurisdiction independently of any question of domicile, and in 23 *Amer. & Eng. Ency. of Law* (2d. Ed.) p. 1006, also relied on by counsel, though it is said that a court of one state will not, in general, take charge of the business of a corporation organized under the laws of another state that the place for a general receivership or entire winding up proceedings is at the domicile, it is further said, in the same connection, that a receiver may be appointed for the property of a foreign corporation found within the jurisdiction of the court.

True, where there is a general receivership at the domicile of the corporation the foreign receiver would ordinarily be appointed as ancillary only, but that does not militate against the power of the court by virtue of its equity jurisdiction to deal with property within its reach belonging to the corporation for the benefit of creditors invoking its authority so far as necessary to protect the rights of such creditors.

Our attention is called to *Northwestern Iron Co. v. Central Trust Co. of New York*, 90 Wis. 570, 63 N. W. Rep. 752, 64 N. W. Rep. 323, where the question was raised, but not decided, as to whether a creditor's action of this kind may be maintained, language being used well calculated to cast doubt upon whether such an action is maintainable. Notwithstanding what is there said it is now considered that by the weight of authority and upon reason and principle as well the action is maintainable. We refer to *Thompson on Corporations*, secs. 6860-6861; *Smith v. St. Louis Mutual Life Ins. Co.*, 3 Tenn. Ch. 502-505; *Murray v. Vanderbilt*, 39 Barb. (N. Y.) 140-147; *Redmond v. Hoge*, 3 Hun (N. Y.) 171; *National Trust Co. v. Miller*, 33 N. J. Eq. 155; *Richardson v. Clinton Wall Trunk Co.*, 181 Mass. 580, 64 N. E. Rep. 400; *De Bemer v. Drew*, 57 Barb. (N. Y.) 438; *Tinkham v. Borst*, 31 Barb. (N. Y.) 407.

It is not claimed that the above authorities are in all respects directly in point, but they clearly recognize or declare the principle that a court of equity has ample authority to entertain a suit against a foreign corporation to conserve its property within its jurisdiction to enforce payment of a judgment at law therein, legal remedies for its collection having been exhausted and to vindicate the

rights of all other creditors to recover their claims, who come into or are made parties to the litigation, so far as equity requires it.

Some other matters are discussed by counsel but they do not seem material and so we will omit special mention of them. The complaint at this time is sustained, limited to the purposes of a creditor's action only.

The order is reversed, and the cause remanded for further proceedings according to law.

Note—Receiverships—Foreign Corporations.—

The rule that a receivership for the general winding up of the affairs of a corporation may only be had in the state of its domicile is too well established to merit comment. But a very different proposition is presented in the principal case, viz.: whether or not a receiver may be appointed to take charge of and conserve the assets of a foreign corporation found within the local jurisdiction, and subject such assets to the claims of creditors.

There is good authority for the proposition that a receiver may properly be appointed to take charge of the assets of a foreign corporation within the state of the former, and this power has been upheld even where the court did not have jurisdiction of the defendant corporation, but only of the assets, where there was immediate necessity for such appointment. In *Ghins v. Iron Hall*, 21 N. Y. Supp. 543, the court says: "The sole question is one of jurisdiction, and as it clearly appears that the plaintiff is a resident of this state, that the corporation has property within this state which this action seeks to preserve . . . we think the court had jurisdiction, and that the order denying the motion to vacate the order appointing the receiver should be affirmed."

Judge Thompson says: "Where the foreign corporation is in the act of withdrawing its assets from the state to the prejudice of its local creditors, there may be . . . the greatest propriety in a court of equity laying hold of its assets and impounding them for the benefit of its local creditors . . . It is believed that no principle can be suggested which disables a court of equity, in a proper case, from taking that course with the assets of a non-resident debtor, corporate or unincorporate; and such a power is constantly exercised by courts of equity where they have acquired jurisdiction on other grounds." *Thompson on Corporations*, secs. 6860 and 6861. In other words, the true doctrine, as laid down by Judge Thompson, is that under a proper showing of facts the creditor is entitled to have the assets taken charge of by a receiver regardless of whether the defendant is a foreign corporation or not. See also *Albert v. Clarendon Land Co.* (N. J. Eq.), 23 Atl. Rep. 8. The New York Code provides for the appointment of receivers of the assets of foreign corporations on the application of judgment creditors. *Shinney v. N. A. Sav., etc., Co.*, 97 Fed. Rep. 9; *National Trust Co. v. Miller*, 33 N. J. Eq. 155; *MacNabb v. Porter Air-Lighter Co.*, 44 N. Y. App. Div. 102; *Redmond v. Hoge*, 3 Hun. (N. Y.) 171.

In *Hutchinson v. American Palace Car Co.*, 104 Fed. Rep. 182, it is said: "It is true that every state is entitled to take control, according to its own local rules, of property lying within it, and this is independently of the question of domicile; so that, under exceptional circumstances there is no doubt that a local tribunal may properly constitute a receiver-

ship of assets actually within its jurisdiction, independently of any question of domicile. Nevertheless, where the purpose is to wind up a corporation, or a joint stock association, or a co-partnership, on account of alleged insolvency, or fraudulent transactions, or where it is desired to obtain a general receivership, as this expression is commonly understood, initial proceedings should be at the place of domicile, and the other receivership should be ancillary thereto." See also *Holbrook v. Ford*, 153 Ill. 633.

Owing to the enormous business carried on by corporations at the present day in states other than that of their domicile, the principal case is one of great importance. Cases on the point are not numerous, but seem to sustain the position taken in the principal case, which is based on sound reasoning.

JETSAM AND FLOTSAM.

A CORRECTION.

In our issue of August 7, 1908, being number 6, of volume 67, our bindery girls unfortunately made a mistake in folding some of the copies. As our copies on hand are also folded wrong we cannot supply perfect copies.

It is a very simple matter for the subscriber to correct this defect.

Open the journal in the middle and raise the points of the staples with a pen-knife and carefully remove them. Then take the third and fourth sheets beginning from the cover page (being pages 107 to 114 inclusive) and place these two sheets in the middle following page 106 and preceding page 115. This makes all the pages run in numerical order. Replace the staples from the back and refasten by bending the ends, and the journal is correct and perfect.

NEWS ITEM.

NOTED MEN OF MANY STATES AT ATTORNEY GENERALS' MEETING.

Attorney General W. H. Dickson of Colorado informs us that several well-known attorneys-general from various parts of the United States have accepted invitations to speak before the annual convention of the attorneys-general, which is to be held in Denver August 20 and 21.

Hon. Alexander M. Garber, the attorney-general of Alabama, will speak on "The New Question of States' Rights." Hon. Francis J. Heney of San Francisco will give an address entitled "The Inadequacies and Deficiencies of the Criminal Statutes in the Prosecution of Municipal Grafters;" Hon. Frank S. Jackson, attorney-general of Kansas, will address the convention upon "The Liquor Traffic;" Hon. R. V. David-

son, attorney-general of Texas, will discuss "The Results of Anti-Trust Legislation," and Attorney-General Charles West will talk about "Experiences in Government."

One of the leading solicitors of one of the large railway systems will discuss the railway side of the railway question. In addition to these speakers, a representative of the attorney-general's office of the United States will be present at the convention and will address the delegates.

HUMOR OF THE LAW.

Rufus Choate once endeavored to make a witness give an illustration of absent-mindedness. "Wal," said the witness cautiously, "I should say that a man who thought he'd left his watch to hum, an' took it out'n his pocket to see if he had time to go hum to get it—I should say that feller was a leetle absent-minded."

WEEKLY DIGEST.

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1. Abandonment—Statutory Provisions.—Rev. St. 1899, sec. 4268 (Ann. St. 1906, p. 2842), limiting the right to sue to recover certain land by claimants who have not had possession nor paid taxes for 30 years, held to apply to legal, as well as equitable titles.—*Campbell v. Greer*, Mo., 108 S. W. Rep. 54.

2. Abatement and Revival—Discontinuance.—A pending action in the federal court against the lessee of a railroad for personal injuries is no bar to an action in the state courts against the lessor on the same cause of action.—*Mayfield v. Atlanta & C. Air Line Ry. Co.*, S. C., 61 S. E. Rep. 106.

3. Adverse Possession—Against Whom Statute May Run.—Where adverse possession commenced to run against the grantor during his life, it continued to run against the remaindermen during the life tenancy.—*Hubbard v. Sworford Bros. Dry Goods Co.*, Mo., 108 S. W. Rep. 15.

4. Appeal and Error—Bill of Exceptions.—Where evidence taken before a referee was returned with the referee's report, and the bill of exceptions called for the report and the evi-

dence, it was made a part of the bill of exceptions, so as to be available to respondents, though the evidence was not contained in the abstract.—*Berry v. Rood*, Mo., 108 S. W. Rep. 22.

5.—**Findings.**—On appeal in an action to redeem land sold under foreclosure, the chancellor's findings as to the amount to be paid should not be disturbed where supported by evidence.—*Potter v. Schaffer*, Mo., 108 S. W. Rep. 60.

6.—**Bankruptcy—Assets.**—Where a bankrupt, while insolvent, purchased an annuity in a mutual life insurance company, the bankrupt's trustee prior to the date the insurance company was required to pay anything under the contract held entitled to cancel the same and recover the consideration paid by the bankrupt therefor.—*Smith v. Mutual Life Ins. Co. of New York*, U. S. D. C., D. Mass., 158 Fed. Rep. 365.

7.—**Claims Against Estate.**—Creditor of a firm whose debts have been assumed by one of the partners, thereby constituting the other partner surety, held not a secured creditor within bankruptcy act, and not required to disclose the other partner's suretyship.—*Schmitt v. Greenberg*, 109 N. Y. Supp. 881.

8.—**Insolvency.**—Payments to certain creditors by an insolvent corporation held, under the evidence, to have been made with intent to prefer such creditors, and to constitute acts of bankruptcy within Bankr. Act, c. 541, sec. 3a (2).—*John Naylor & Co. v. Christiansen Harness Mfg. Co.*, U. S. C. C. of App., Sixth Circuit, 158 Fed. Rep. 290.

9.—**Liens.**—Where land subject to a deed of trust was devised to a bankrupt, and his sister, the holder of the debt secured was entitled to payment in full out of the bankrupt's share of the property, reserving to the bankrupt's creditors the right to subrogation to his claim for contribution against his sister.—*In re Straub*, U. S. D. C., N. D. W. Va., 158 Fed. Rep. 375.

10.—**Receiver.**—Where a seller of goods to a bankrupt claimed that the sale was induced by fraud, he could not, on rescinding the sale, recover the goods in replevin after the appointment of a receiver for the bankrupt's property, though before adjudication.—*In re Alton Mfg. Co.*, U. S. D. C., D. R. I., 158 Fed. Rep. 367.

11.—**Rules.**—Under Arkansas bankruptcy rule 12 (1) it was improper for a referee in bankruptcy pending proceedings for the examination of the bankrupt to discover assets alleged to have been concealed to report that the proceedings were sufficiently advanced to entitle the bankrupt to his discharge.—*In re Johnson*, U. S. D. C., N. D. Ark., 158 Fed. Rep. 342.

12.—**Transfers by Bankrupt.**—It was no objection to an equitable assignment of a bankrupt's accounts that the bankrupt did not put the assignment in writing because he feared he would not then be able to retain the money he collected on the accounts, and use it according to the exigencies of his business.—*In re Macauley*, U. S. D. C., E. D. Mich., 158 Fed. Rep. 322.

13.—**Banks and Banking—Clearing House.**—The payment by a bank through the clearing house of a check which overdraws the depositor's account cannot be treated as voluntary with full knowledge of all the facts.—*Citizens' Cent. Nat. Bank v. New Amsterdam Nat. Bank*, 109 N. Y. Supp. 872.

14.—**Benefit Societies—Suspension of Subordinate Lodge.**—A secretary of a subordinate lodge of a mutual benefit society acts as the agent

of the subordinate lodge and its members, and not of the grand lodge, in sending up assessments.—*Grand Lodge United Brothers of Friendship of Texas v. Williams*, Tex., 108 S. W. Rep. 195.

15.—**Bills and Notes—Actions.**—In an action by the indorsee of a draft, the burden was on such indorsee to show by a fair preponderance of the evidence that it acquired a draft in good faith for value, and without notice of any fatal infirmity.—*Royal Bank of New York v. German-American Ins. Co.*, 109 N. Y. Supp. 822.

16.—**Bona Fide Purchaser.**—Where claimant purchased certain notes from his agent, and claimed that the agent was a bona fide purchaser for value, the burden was on the claimant to prove such fact and make a full disclosure.—*In re Hopper-Morgan Co.*, U. S. D. C., N. D. N. Y., 158 Fed. Rep. 351.

17.—**Bona Fide Purchasers.**—A note held valid against the maker in favor of one who purchased before maturity for value and in good faith.—*New Madrid Banking Co. v. Poplin*, Mo., 108 S. W. Rep. 115.

18.—**Boundaries—Establishment.**—When there is a dispute as to the location of the true boundary line between two adjoining proprietors, or where the line is uncertain, and they are ignorant of its true location, and by agreement they fix upon a permanent boundary line and take possession in pursuance thereof, then the agreement is valid and binding on the parties thereto and those claiming under them.—*Reynolds v. Hood*, Mo., 108 S. W. Rep. 86.

19.—**Brokers—Commissions.**—A broker employed to obtain a loan held entitled to his commissions, though the loan was not made because of his client's failure to satisfy liens on the property.—*Neffelberger v. Garner*, 109 N. Y. Supp. 747.

20.—**Carriers—Carriage of Live Stock.**—A carrier's delay in handling plaintiff's claim for the loss of a mule held a waiver of a stipulation that no suit should be maintained for damages unless brought within six months after the cause of action accrued.—*Howse v. New Orleans & N. E. R. Co.*, Miss., 45 So. Rep. 837.

21.—**Carrying Passengers Beyond Destination.**—A passenger carried beyond the station of her destination held not entitled to maintain an action for the damages sustained.—*Illinois Cent. R. Co. v. Walker*, Ky., 108 S. W. Rep. 278.

22.—**Ejection of Passenger.**—Where a conductor on a train refused to accept plaintiff's ticket, and threatened to put him off if he did not pay his fare, and laid his hands so heavily on plaintiff as to cause pain and tend to put him in fear of further personal violence, it appearing that any force was unnecessary, the act was excessive, and would support an inference of malice.—*Glover v. Atchison, T. & S. F. Ry. Co.*, Mo., 108 S. W. Rep. 105.

23.—**Failure to Inspect Car.**—An ultimate connecting carrier held not negligent in failing to ascertain that the unloading valve of an oil tank car was open before delivering the car to the consignee.—*Gulf, W. T. & P. Ry. Co. v. Wittnebert*, Tex., 108 S. W. Rep. 150.

24.—**Negligence.**—Whether a trolley car conductor was negligent in failing to assist a passenger onto the car depends on the circumstances as they appeared to the conductor, or as they should have appeared to a person in the exercise of proper care.—*Richardson v. Augusta & A. Ry. Co.*, S. C., 61 S. E. Rep. 83.

25.—**Chattel Mortgages—Assignments.**—The holder of a note under seal and of a chattel

mortgage also under seal, securing the note, can transfer only the right, title and interest he has therein.—*J. C. Stevenson Co. v. Betha, S. C., 61 S. E. Rep. 99.*

26. **Commerce**—Interstate Commerce.—Transportation of goods from another state into New Jersey, and delivery in the original packages to the purchasers in that state under a contract of sale, cannot be interfered with by the state or any of its municipalities, except for police purposes.—*Simpson-Crawford Co. v. Borough of Atlantic Highlands, U. S. C. C., N. D. Ala., 158 Fed. Rep. 372.*

27. **Constitutional Law**—Due Process of Law.—The fourteenth amendment to the Constitution of the United States, requiring due process of law, merely applied to the legislation of the states an elementary principle of the common law, which was a part of the fundamental law of the several states and which the federal courts in administering the law of the states were previously bound to recognize and enforce.—*Anderson v. Messenger, U. S. C. C. of App., Sixth Circuit, 158 Rep. 250.*

28. **Equal Protection**.—Acts 1905, pp. 357, 358 (being a copy of Act May 23, 1901, Acts 1901, pp. 309-311), relating to the issuance of script by corporations, etc., to its employees, and excluding certain corporations from its operation, held an unlawful discrimination, and void.—*Union Sawmill Co. v. Felsenthal, Ark., 108 S. W. Rep. 217.*

29. **Contracts**—Construction.—Where there is no ambiguity in an instrument and the parties' intentions may be ascertained from its terms without explanation, it is the duty of the court to construe it and instruct the jury as to the rights of the parties.—*Reagan v. Bruff, Tex., 108 S. W. Rep. 185.*

30. **Enforcement**.—A deposit of notes in trust held to be for the purpose of paying a debt due plaintiff, and to entitle plaintiff to enforce payment, under Civ. Code Prac. sec. 18.—*Albin Co. v. Commonwealth, Ky., 108 S. W. Rep. 299.*

31. **Sufficiency of Performance**.—Where, for so much a foot, plaintiff agreed to dig a well to a certain depth, unless a supply of water satisfactory to defendant be found at a less depth, defendant held not entitled to say arbitrarily that a supply at less than the agreed depth is not satisfactory, and therefore refuse payment for the work performed.—*Fessman v. Barnes, Tex., 108 S. W. Rep. 170.*

32. **Corporations**—Duties of Officers.—Resolution of directors fixing the salary of president and treasurer held voidable at the instance of a stockholder.—*Miller v. Crown Perfumery Co., 109 N. Y. Supp. 760.*

33. **Mercantile Pursuits**.—A corporation engaged in conducting a general livery and boarding stable held not a corporation engaged chiefly in trading or mercantile pursuits within Bankr. Act, c. 541, sec. 4, cl. "B."—*Gallagher v. De Lancey Stables Co., U. S. D. C., E. D. Pa., 158 Fed. Rep. 381.*

34. **Organization**.—When the certificate of incorporation is issued by the secretary of state and delivered to and accepted by the corporation, the individuality of the incorporators as such are merged in the corporation.—*Boatmen's Bank v. Gillespie, Mo., 108 S. W. Rep. 74.*

35. **Recovery of Amount Paid**.—One suing a corporation for a rescission of a stock subscription contract and for a recovery of the amount paid for the stock need not allege in the complaint a tender of the stock and a

demand for the return of the sum paid.—*Cawthra v. Stewart, 109 N. Y. Supp. 770.*

36. **Counties**—Duties of Sheriff.—A police jury has no power to deal with the duties of the sheriff and to subject them to direct orders from it.—*State v. Davis, La., 45 So. Rep. 838.*

37. **Courts**—Federal Jurisdiction.—Where federal jurisdiction rests on diversity of citizenship, it is no objection that citizens of different states other than the state in which the suit is instituted are combined as co-complainants.—*Schultz v. Highland Gold Mines Co., U. S. C. C., D. Oreg., 158 Fed. Rep. 337.*

38. **Criminal Evidence**—Admission of Evidence.—Any statement or conduct of a person indicating a consciousness of guilt where at the time or thereafter he is charged with or suspected of the crime is admissible as a circumstance against him on his trial.—*Hixon v. State, Ga., 61 S. E. Rep. 14.*

39. **Criminal Trial**—Admissibility of Evidence.—In a prosecution for homicide held, that proof of threats by deceased should have been considered only as throwing light on the conduct of accused.—*Brooks v. State, Ark., 108 S. W. Rep. 205.*

40. **Form of Verdict**.—In a murder case, a verdict: "We, the jury, find defendant guilty as charged, but cannot agree as to punishment, but do agree to ask the mercy of the court"—is indefinite, and the jury should have been required to clear it up.—*Sykes v. State, Miss., 45 So. Rep. 838.*

41. **Province of Jury**.—A jury is the judge of the credibility of witnesses and the weight of their testimony.—*Thomas v. State, Ark., 108 S. W. Rep. 224.*

42. **Customs and Usages**—Incorporation of Custom.—A custom among publishers of publishing the names of authors of articles could not be read into a contract to write articles without proof that writers for other publications were under similar contracts, or that the parties contracted with reference to such custom.—*Jones v. American Law Book Co., 109 N. Y. Supp. 706.*

43. **Death**—Presumptions.—Circumstances showing that an unmarried person 21 years of age had disappeared, and that for 37 years nothing was ever heard of him, though search and inquiry was made, held to raise the presumption of death after the lapse of seven years from his disappearance.—*Barson v. Mulligan, N. Y., 84 N. E. Rep. 75.*

44. **Dedication**—Intent.—In the absence of an intent to dedicate a passageway to public use, that it was shown on the map of the city addition, recorded by the owner of the land, did not constitute a dedication.—*Weidmeyer v. Reitch, Tex., 108 S. W. Rep. 167.*

45. **Deeds**—Delay in Recording.—Though mere delay in recording a deed is not ordinarily evidence of fraud, if a motive for the delay is shown, as where a deed is forged or obtained by fraud, delay may well excite suspicion.—*Morgan v. Combs, Ky., 108 S. W. Rep. 272.*

46. **Depositions**—Use as Evidence.—Where the trial court refused to allow a party to read in evidence a deposition taken by the adverse party on notice, but offered to grant a continuance to take testimony, and the party declined the offer, the ruling of the court was not erroneous.—*Ong Chair Co. v. Cook, Ark., 108 S. W. Rep. 203.*

47. **Descent and Distribution**—Presumption of Death.—Where it is established by presump-

tion that an unmarried person is dead, and no claim is made for over 37 years to his estate by any one claiming as his issue, it will be presumed that he died without issue.—*Barson v. Mulligan*, N. Y., 84 N. E. Rep. 75.

48. **Divorce—Alimony.**—Testimony asked for in an affidavit in a separation proceeding for the examination of a witness before trial *de bene esse* held not material upon the question of alimony because referring to conduct of the parties prior to their marriage.—*Gould v. Gould*, 109 N. Y. Supp. 910.

49. **Dower—Postnuptial Agreement.**—Where a conveyance is made in lieu of dower, the law does not require a specific statement to that effect; it being sufficient if the intention of the grantor is implied from the instrument.—*Morgan v. Sparks*, Ky., 108 S. W. Rep. 233.

50. **Estoppel—Effect as Against Grantee.**—One who as between himself and another was under duty to pay the taxes on real estate, but who permitted the same to be sold for taxes and afterward acquired the tax title, cannot avail himself of the same or of the fact of sale, to defeat the title of such other.—*Anderson v. Messenger*, U. S. C. C. of App., Second Circuit, 158 Fed. Rep. 250.

51. **Evidence—Presumptions.**—Where a party to a transaction is dead no inference should be drawn from his conduct therein unfavorable to him without proof.—*Stokes v. Waters' Ex'r*, Ky., 108 S. W. Rep. 275.

52. **Relevancy.**—Where a contract in suit, which was for the sale and purchase of lumber, was clear and explicit in its terms, evidence as to the nonperformance by plaintiff of a previous contract between the parties, not in suit, was properly excluded as irrelevant.—*Salmon v. Helena Box Co.*, U. S. C. C. of App., Eighth Circuit, 158 Fed. Rep. 300.

53. **Execution—Sale.**—Where jurisdictional facts appear on the record of judgments rendered by courts of general jurisdiction a purchaser under an execution sale will be protected without looking farther.—*Rutherford v. Ray*, N. C., 61 S. E. Rep. 57.

54. **Frauds, Statute of—Evidence.**—Proof to sustain a claim in the face of the statute of frauds based on the performance of an unwritten contract must be overwhelming in its probative force, leaving no room for reasonable doubt.—*Wales v. Holden*, Mo., 108 S. W. Rep. 89.

55. **Fraudulent Conveyances—Presumptions and Burden of Proof.**—Where there was no finding of certain facts, the presumption of a good faith mortgage valid as to creditors held not overcome so as to render the mortgage void within *Burns' Ann. St.* 1901, sec. 6646, notwithstanding a finding of a certain other fact.—*Hamrick v. Hoover*, Ind., 84 N. E. Rep. 28.

56. **Remedies of Creditors.**—A judgment creditor held entitled to equitable relief against a fraudulent conveyance though the judgment was a lien on the land enforceable by execution.—*Holland v. Grote*, 109 N. Y. Supp. 787.

57. **Guaranty—Extent of Liability.**—A guaranty for the payment of rent held to bind the guarantor to pay rent only for the time the tenant is in the actual occupation.—*Woods v. Broder*, 109 N. Y. Supp. 908.

58. **Guardian and Ward—Care of Ward's Estate.**—A guardian who is also the father of the infant ward held not entitled, under *Civ. Code Prac.* sec. 489, subsec. 3, to sell her real estate unless it be clearly shown that he is unable to support and educate her, which fact must be alleged in the petition.—*Campbell v. Goodin's Guardian*, Ky., 108 S. W. Rep. 243.

59. **Habeas Corpus—Federal Courts.**—A person imprisoned pursuant to a judgment of a court of a territory for violation of a territorial law is not entitled to a writ of habeas corpus from a federal court under *Rev. St. sec. 753* (U. S. Comp. St. 1901, p. 592).—*Connella v. Haskell*, U. S. C. C. of App., Eighth Circuit, 158 Fed. Rep. 285.

60. **Homicide—Design to Kill Another.**—One who, shooting at another with intent to kill him, hits and kills a third person, is as guilty as if he had killed the person shot at.—*State v. Baker*, Mo., 108 S. W. Rep. 6.

61. **Evidence.**—Testimony of a state witness held too unworthy of belief to sustain a conviction of murder.—*Sykes v. State*, Miss., 45 So. Rep. 838.

62. **Interest—Time and Computation.**—An insurance company having received municipal funds employed by an official of the city to pay premiums held liable to the city for interest from the time when the money was received.—*City of Newburyport v. Fidelity Mut. Life Ins. Co.*, Mass., 84 N. E. Rep. 12.

63. **Intoxicating Liquors—Regulation.**—The legislature in the exercise of its police power may regulate or entirely prohibit the manufacture and sale of liquors, and may prohibit possession thereof with intent to sell or give away, and make such possession *prima facie* evidence of guilt.—*State v. Williams*, N. C., 61 S. E. Rep. 61.

64. **Withdrawal of Names from Permit.**—Right of petitioners to withdraw their names or oppose granting their petition for revocation of an order of the county court prohibiting the sale of intoxicating liquors within certain limits considered.—*Phillips v. Goe*, Ark., 108 S. W. Rep. 207.

65. **Judgment—Collateral Attack.**—A judgment in personam against a person who is *sui juris* when no process has been served or service accepted and no voluntary appearance is made, and these facts appear on the record, is void, and may be attacked collaterally.—*Rutherford v. Ray*, N. C., 61 S. E. Rep. 57.

66. **Conclusiveness.**—A judgment dismissing an information in the nature of quo warranto filed by the prosecuting attorney of a county against the trustees of a town, attacking the validity of the incorporation of the town, held not a bar to a subsequent information against the town and its trustees.—*State v. Town of Bellflower*, Mo., 108 S. W. Rep. 117.

67. **Parties.**—Where on appeal from a justice in forcible detainer against a husband and wife there was a discontinuance as to the wife it was error to hold that no recovery could be had as to the guilty husband.—*Monahan v. Schwartz*, Ky., 108 S. W. Rep. 285.

68. **Landlord and Tenant—Covenants for Quiet Enjoyment.**—In an action for rent due, held a good defense that lessor rented other apartments in the building for immoral and illegal purposes, and, on request to evict such occupants, failed to do so.—*J. W. Cushman & Co. v. Thompson*, 109 N. Y. Supp. 757.

69. **Hostile Title.**—A tenant held not entitled to acquire a title in opposition to the landlord's title before renouncing the tenancy and restoring the premises.—*King v. Hill*, Ky., 108 S. W. Rep. 238.

70. **Injuries to Third Persons.**—A landlord held not liable for injuries to a third person by reason of the defective condition of an appur-

tenant to the premises under the control of the lessee.—*Gelof v. Morgenroth*, 109 N. Y. Supp. 880.

71.—**Option to Purchase.**—Mere lapse of time without obtaining an award by referees appointed to fix a price on lessees electing to purchase is insufficient to show that they had lost their right to hold the property as purchasers without payment of rent.—*Washburn v. White*, Mass., 84 N. E. Rep. 106.

72.—**Libel and Slander.**—Evidence.—In an action for slander in charging plaintiff with theft, evidence of plaintiff's indictment for the theft and his acquittal is inadmissible.—*Whittaker v. McQueen*, Ky., 108 S. W. Rep. 236.

73.—**Licenses.**—Ordinance.—An apprentice or helper working under the supervision of a licensed plumber held not amenable to an ordinance forbidding any person to engage in the business of plumbing without first procuring a license.—*Felton v. City of Atlanta*, Ga., 61 S. E. Rep. 27.

74.—**Life Insurance.**—What Law Governs.—A fire policy made in Louisiana held a Louisiana contract governed by the laws of that state.—*Aetna Ins. Co. v. Mount*, Miss., 45 So. Rep. 835.

75.—**Literary Property.**—Exclusive Property.—Neither a book nor a photograph can continue to be the author's exclusive property after it has been printed and offered to the public for sale without being copyrighted.—*Bamforth v. Douglass Post Card & Machine Co.*, U. S. C. C. E. D. Pa., 158 Fed. Rep. 355.

76.—**Mandamus.**—Contract with Teacher.—Where an employee of a manufacturer learns collection of the amount due him for his salary except by levy of a tax provided for by statute, he has such special interest therein as that he may by mandamus compel the levy of the tax.—*Dennington v. Town of Roberta*, Ga., 61 S. E. Rep. 20.

77.—**Master and Servant.**—Duty to Master.—Where an employee of a manufacturer learns while acting as superintendent that his employer wished to acquire a patent in order to protect and develop his business, it is a violation of his duty to secretly purchase the patent either for the purpose of afterwards selling it to the employer at an advanced price, or of using the same to the injury of the employer.—*American Circular Loom Co. v. Wilson*, Mass., 84 N. E. Rep. 133.

78.—**Injury to Servant.**—It is the duty of a master to exercise reasonable care to protect his servants from exposure to contagious or infectious disease while in the performance of their work, and such duty, like that to provide a reasonably safe place and appliances, is absolute, and cannot be delegated.—*O'Connor v. Armour Packing Co.*, U. S. C. C. of App., Fifth Circuit, 158 Fed. Rep. 241.

79.—**Liabilities for Injuries to Third Persons.**—In an action to recover for destruction of property by a fire set out by defendant, where there was testimony that the fire was set out by a servant of defendant, it was error to reject evidence that he was actually engaged in defendant's business at the time.—*Gibson v. W. C. Wood Lumber Co.*, Miss., 45 So. Rep. 834.

80.—**Retention of Unfit Employee.**—The retention by the master of an unfit employee is not of itself enough to establish liability for an injury to a servant; but, in addition thereto, it must be shown that the unfit employee's negligence contributed to the injury.—*Zeller, McClelland & Co. v. Wright*, Ind., 83 N. E. Rep. 1030.

81.—**Mortgages.**—Foreclosure.—A mortgagee

entitled to foreclosure of his mortgage as against a purchaser of the mortgaged premises held entitled to judgment against the purchaser and for foreclosure of the mortgage.—*Union Trust Co. v. Scott*, Ind., 82 N. E. Rep. 1031.

82.—**Municipal Corporations.**—Action on Tax Deed.—Where the same kind of a sidewalk and of the same dimensions was to be laid in front of two lots, the estimate of the city engineer of the cost of the sidewalk was sufficient, though it was not separately made for each lot.—*City of Mexico v. Lakenan*, Mo., 108 S. W. Rep. 141.

83.—**Evidentiary Matters.**—Where the ultimate fact that a city was incorporated since a certain date is found, it is unnecessary for the findings to state evidentiary matters relating thereto.—*Pavey v. Braddock*, Ind., 84 N. E. Rep. 5.

84.—**Injury to Traveler Using Street.**—A city in closing a street to improve it, and thereby rendering it dangerous to travelers, held required to exercise ordinary care to provide adequate danger signals to warn travelers.—*Ahlfeldt v. City of Mexico*, Mo., 108 S. W. Rep. 122.

85.—**Revocation of Building Permits.**—Under Ky. St. 1903, sec. 2861, giving the board of public safety exclusive control of the department of buildings, the board held authorized to direct the cancellation of a permit granted in violation of a building ordinance notwithstanding work has been commenced thereon.—*O'Bryan v. Highland Apartment Co.*, Ky., 108 S. W. Rep. 257.

86.—**Validity of Tax Sale.**—One who as between himself and another was under duty to pay the taxes on real estate, but who permitted the same to be sold for taxes, and afterward acquired the tax title, cannot avail himself of the same or of the fact of sale to defeat the title of such other.—*Anderson v. Messenger*, U. S. C. C. of App., Sixth Circuit, 158 Fed. Rep. 250.

87.—**Negligence.**—Pleading.—Plaintiff in an action for personal injuries may allege negligence in general terms, and under this may show any specific acts of negligence; but if he alleges specifically the acts constituting the negligence complained of, he cannot avail himself of other acts not alleged.—*Edwards' Adm'r v. Chesapeake & O. Ry. Co.*, Ky., 108 S. W. Rep. 303.

88.—**Nuisance.**—Injunctions.—An injunction will not lie to restrain defendant from erecting a stable across the street from plaintiff's residence, since a stable is not a nuisance per se.—*Hyden v. Terry*, Ky., 108 S. W. Rep. 241.

89.—**Prescription.**—A structure built and extended by an elevated railroad beyond the franchise limits granted to it is a public nuisance and prescription does not justify its existence, as against a private person.—*Bremer v. Manhattan Ry. Co.*, N. Y., 84 N. E. Rep. 59.

90.—**Witness.**—Constitutional Privileges.—Rev. Codes 1905, sec. 9383, held not to grant immunity from prosecution, co-extensive with the constitutional guaranty section 13 that no person shall be compelled to be a witness against himself unless granted unconditional immunity.—*In re Beer*, N. D., 115 N. W. Rep. 672.

91.—**Work and Labor.**—Compensation of Witness.—A civil engineer performing services in making investigations to qualify himself as an expert witness held entitled to recover for the services rendered upon an implied promise for compensation.—*Tiffany v. Kellogg Iron Works*, 109 N. Y. Supp. 754.

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RIGHT OF TELEPHONE COMPANY TO LIMIT USE OF TELEPHONE TO SUB- SCRIBER.

What appears to us to be a serious error and yet a very interesting question of law has arisen in the superior court of Seattle in the case of *Swift v. Independent Telephone Company*, which will probably reach the court of last resort in due time, but which is so novel that we refer to it at this time.

According to Judge Arthur E. Griffin's decision in that case, the day of the free public telephone at the drug store, or elsewhere, is past. The public telephone at Swift's drug store, in Seattle, responded to an average business of 179 1-4 calls per day, for which service the proprietor paid \$3 per month. The number of calls on all the telephones of the Independent system averages 9.2 per day. According to the price charged, on the basis of the business done, the Swift public telephone should pay about \$78 per month, according to the claims of the company.

Mr. Swift objected to the installation of a nickel-in-the-slot telephone and also to the loss of the one used in his business at the existing rate. He asked the superior court for an injunction forbidding the company to remove the one and replace it with the other. A temporary restraining order was issued, and the case was heard by Judge Griffin a few days ago the court upholding the contentions of the telephone company.

The decision of the court is to the effect that the plaintiff's public telephone is not such a telephone as the defendant, by its franchise, is obliged to furnish; that the plaintiff has no legal right to require the defendant to furnish such a phone, and that the defendant is justified in disconnecting it. It is admitted by the court that

the rule of the defendant company that its telephones shall not be subject to general use, but limited to the plaintiff, is a reasonable rule, and the defendant company was justified in removing the phone after due notice. The court found that the telephone company is justified in requiring that telephones installed in drug stores, and other places of business, for public use, be used and operated on the nickel-in-the-slot plan, and to charge 5 cents for such use. The decision states that the telephone company would illegally discriminate against other subscribers if it allowed its telephones to be used free of charge by the general public. The temporary restraining order was dissolved and the application for an injunction denied.

The decision of the court in this case overlooks one important consideration, to-wit; that a telephone company is a quasi public corporation given certain public franchises in consideration of which it must serve all people alike. If John Smith wanted an unlimited phone and contracted for an unlimited phone, the company could not come, at the end of the month and force John Smith to put in a limited phone or a nickel-in-the-slot machine on the ground that he used the phone more often than others. It would seem that if the subscriber is paying for an unlimited phone it should make no difference whether he himself called up one hundred times a day or members of his family or neighbors or customers.

If a telephone company desires to make all phones limited to a certain number of calls per day they may do so, but must make the same contract with everybody. Where, however, they offer unlimited phones to some and refuse them arbitrarily to others they are clearly overstepping the mark and should be compelled by mandamus to serve the public alike.

This case raises the interesting question: To whom does a phone belong, the subscriber or the company? It has been customary for a telephone subscriber to assume the attitude of a tenant in a dwelling

house, to-wit, that of complete ownership so far as the use and possession goes. A man rents a phone like he rents a house. It becomes his as long as he pays his rent and it would be considered an intrusion for the telephone company to keep a spy upon the premises to see that no one but the original subscriber used the phone. It has been presumed without question that a man's right to use his own telephone could be delegated to another to use for him. Suppose then, a subscriber employed a young man to answer the telephone and to make calls, could not the master request calls to be made in the interest of friends in distress or otherwise, or is the intent and purpose of the subscriber in every case to be questioned by the telephone company?

We do not believe the rule announced by the nisi prius court in Seattle will stand close inspection. It will certainly be met by unanimous public condemnation, which in the case of a public service corporation which owes its franchises and its very existence to the public is a very important consideration. In all such cases it behooves the court to keep the public welfare paramount to the private interests of the companies concerned.

NOTES OF IMPORTANT DECISIONS

INNKEEPERS—WHO ARE.—The case of *Nelson v. Johnson* (Minn.), 116 N. W. Rep. 828, discusses in an interesting way the question of boarding house and innkeepers. Defendant kept a place known as "Bridge Square Hotel." There were 36 rooms in the place for the entertainment of travelers and transient lodgers. Persons were entertained for a single night, or for a longer period, as desired. No meals were served. A register was kept in which guests inscribed their names. Plaintiff came to defendant's place and registered, and paid for a night's lodging. During the night there was stolen from his clothing the sum of \$95.00. Suit was brought and the trial judge held that the relation existing between plaintiff and defendant was that of common innkeeper and guest. There was judgment for plaintiff although the finding of fact was

that there was no negligence on the part of either the plaintiff or the defendant. The chief contention on behalf of the defendant was that as no meals were served, the place was not an inn.

The trial judge made the following remarks, which are approved by the supreme court:

"It seems to me impossible to suggest any reason why, upon principle, the extreme degree of liability should or should not be imposed upon the keeper of a place where the traveling public are offered lodgings, according as he does or does not furnish meals for his lodgers. * * * The need for protection to the traveler's property is incident to his lodging, and not to his eating. It is while he is asleep in his bed, and his personal belongings are unguarded by his own watchfulness, that for the security of his property he needs to invoke the most stringent rules of the law of bailment. Especially in large cities does he need this protection. The exigencies of travel bring him often to unfamiliar places, and at hours and under conditions when investigation is impracticable. He must go for bed and shelter to the place which he finds open for his accommodation, trust himself and his property to a stranger, and accept, practically without opportunity for selection, the quarters assigned to him. The rush and turmoil of the city afford to the thief his most attractive field of operation, and the stranger more than others is exposed to his depredations. * * * These considerations lead to the conclusion that the necessities of modern life demand that the extreme degree of responsibility for the property of the guest be applied to the keeper of a place of entertainment for travelers according to the essential features of the relation, and not in fixed adherence to old definitions, or according to the name by which the place is known—whether 'inn,' 'hotel,' or 'lodging house.'"

Referring to the line of authorities which hold to the contrary the court comments, as follows:

"It is, however, stated in many of the textbooks and encyclopedias that a place which does not furnish the traveler with both lodging and food is not an inn. Nearly all of the adjudged cases cited in support of this proposition rely upon the very interesting opinion of Judge Daly in the case of *Cromwell v. Stephens*, 2 Daly (N. Y.), 15, in which it is stated that a mere lodging house, in which no provision is made for supplying lodgers with their meals, wants one of the essential requisites of an inn. The question at issue in that case was, not whether the proprietor of the house was liable to his guests as a keeper of a common inn, but whether the house was a hotel within the meaning of an ordinance fix-

ing water rates for hotels. An examination of the cases cited in that opinion raises a grave doubt whether facilities for furnishing guests with meals was, even at the time the decision was made, an essential requisite of a hotel. However this may be, the question is an open one. Mr. Schouler says: 'Whether the utter omission to provide a place for meals on the premises is enough to take a house for transient lodgers out of the legal fellowship of inns is not clearly determined.' Schouler on Bailments, sec. 278. The question here under consideration was before this court in the case of *Johnson v. Chadbourne Co.*, 89 Minn. 310, 94 N. W. Rep. 874, 99 Am. St. Rep. 571, but was not directly decided, for the reason that there was a restaurant connected with the hotel in question in that case, although it was not owned or controlled by the proprietor of the hotel. The logic of that case, however, leads directly to the conclusion that supplying guests with meals is not now one of the essential requisites of a hotel, in order to charge the proprietor thereof with the liability of a keeper of a common inn; and we so hold."

There is a clear distinction between a mere private lodging house and a hotel where no meals are served. Such a hotel or inn is a house the proprietor of which "holds out that he will receive all travelers and sojourners who are willing to pay a price adequate to the sort of accommodation provided, and who come in a situation in which they are fit to be received." The keeper of such a house is bound, without making any special contract therefor, to provide for all, to the limit of his facilities, at a reasonable price; but the proprietor of a private lodging house is not bound to receive all who apply, but he has the right to select his guests contracting specially with each. The facts found in this case clearly justify the conclusion of law that the defendant was liable as the keeper of an inn or hotel.

This case is not only interesting, but important, as well. It seems a most common-sense view to take, viz., that the character of the establishment and the manner of conducting the business, as well as the representation or holding out, should be looked to rather than the question of whether or not meals are served on the premises. Not every place where meals are served would be regarded as an inn, and the converse is undoubtedly true, that the fact that meals are not served is not conclusive that the place is not an inn. The question of meals might well be considered in connection with other circumstances. The rule relating to the strict liability of innkeepers was founded upon the necessity for protecting the traveler who is away from home, in a strange place, and, under the circumstances, unable to take the same care that might be exercised by one acquainted in the community.

WILL A MECHANICS' LIEN LIE AGAINST THE PROPERTY OF THE JAMESTOWN EXPOSITION COMPANY?

On behalf of the bondholders thereof the point has been raised in the suit for the settlement of the affairs of the Jamestown Exposition Company, now pending in the United States Circuit Court for the eastern district of Virginia, that a mechanics' lien, a number of which have been perfected, will not lie against the property of that company, because it is a public corporation. The point has not been raised before and is therefore novel.

The following arguments are made why such a lien will not attach:

1. The Jamestown Exposition Company is a public corporation. It exists under a special legislative charter, authorizing a corporation for the purpose of carrying out the desire of the people of Virginia and the entire United States to celebrate the three hundredth anniversary of the first permanent settlement of the Anglo-Saxon people on American soil. Its purpose was declared to be public by the president of the United States, under authority of congress; by the governor of Virginia, under authority of the legislature thereof; and by many other legislatures and chief executives of states in all of which proclamations the purpose was declared to be patriotic and educational and for the benefit of the people and the country.

The corporation was authorized, and did solicit and receive financial aid from the public treasuries of the United States government and various states, cities and towns, without other consideration than the public object to be attained and the benefits to be derived by the general public by way of keeping alive patriotism and a personal pride in the country. It was purely educational. The nations of the world were invited and did participate and were entertained out of the public treasuries from funds especially appropriated for that purpose. It was, in no sense, a manufacturing or mercantile

corporation but its life was limited to the purpose for which it was created and it has proven, as predicted, a disastrous financial failure like all of its predecessors.

The Virginia legislature, that created it by special act, required the chief executive of the state to appoint and designate seven citizens to compose a "Board of Governors" for the management of the affairs of the company in association with the board of directors, thereby retaining direct governmental control.

II. It is contended that the appropriation by congress and the legislatures of the various states and the councils of cities of large sums of money for the use of the Jamestown Exposition Company, out of the national, state and municipal treasuries derived from the taxes of the people, is conclusive evidence of the public nature of the corporation, since such appropriations would have been *ultra vires* and illegal and congress must not be supposed to have done an illegal thing and the courts, when it can be avoided, will not so construe its actions. It follows, however, that if the Jamestown Company be not a public corporation then, all these appropriations were absolutely illegal, and the circuit court is squarely confronted with the decision.

The discussion of the authorities starts off with the opinion of Mr. Justice Miller in *Loan Association v. Topeka*,¹ where it is said that, "There can be no lawful tax which is not laid for a public purpose; therefore, the power of taxation cannot be exercised in aid of enterprises strictly private, though, remotely or collaterally, the local public may be benefitted thereby."² It is pointed out that this case has been followed in many states and by the United States Supreme Court, and is cited and relied upon by John Randolph Tucker,³ as "an opinion of great force." Rose's notes to that case also show that it has been followed and approved in more than fifty

cases, covering as many different improper appropriations. In the legal tender cases,⁴ Mr. Chief Justice Chase exclaimed, "And if the property of an individual cannot be transferred to the public, how much less to another individual?" Judge Coulter, in *Northern Liberties v. St. Johns Church*,⁵ concluded that, "I think the common mind has everywhere taken in the understanding that taxes are a public imposition, levied by authority of the government, for the purpose of carrying on the government in all its machinery and operation. * * * That they are imposed for a public purpose." In the "*Topeka Case*," supra, the court dismissed the point, with confidence, in these words, "We have established, we think, beyond cavil, that there can be no lawful tax which is not laid for a public purpose. It may not be easy to draw the line in all cases so as to decide what is a public purpose in this sense and what is not. It is undoubtedly the duty of the legislature which imposes or authorizes municipalities to impose a tax to see that it is not to be used for purposes of private interest instead of a public use, and the courts can only be justified in interposing when a violation of this principle is clear, and the reason for interfering is cogent. * * * In all branches of our government, state and national, the powers of government are limited and defined. In every free government there are rights which are beyond the control of the state," and one of these is the appropriation of public funds for other than public purposes. Mr. Cooley, in his work on "*Taxation*," p. 67, et seq., in summing up the authorities, draws the conclusion that "These decisions of eminent tribunals indicate a limit to legislative power in the matter of taxation, and hold what has been already quoted very many times before, that it is not necessary that the constitution should forbid expressly the taxing for private purposes, since it is im-

(1) 87 U. S. 655-670, 22 L. Ed. 455.

(2) p. 664.

(3) Tucker's "Constitution," vol. 1, sec. 232.

(4) 12 Wall. 581.

(5) 12 Pa. St. 104.

plied in the very idea of taxation that the purpose must be public, and a taking for any other purpose is an unlawful confiscation."

The United States Circuit Court is therefore confronted with the two horns of a dilemma, (1), to declare the Jamestown Exposition Company to be a private corporation, and thereby pronounce the donations of the national, state and municipal governments to have been unconstitutional and illegal, or, (2), to declare that company to be a public corporation, in which event, public policy forbids the filing of a mechanics' lien against its property.

Considerable light is thrown upon this question by Mr. Justice Miller in the *Topeka* case,⁶ by asserting that "In deciding whether in a given case, the object for which the taxes are assessed falls upon the one side or the other of this line, they must be governed mainly by the course and usage of government, the object for which taxes have been customarily and by long course of legislation levied, what objects or purposes have been considered necessary to the support, and for the proper use of the government, whether state or municipal. Whatever lawfully pertains to this, and is sanctioned by time and the acquiescence of the people may well be held to belong to the public use and proper for the maintenance of good government, though this may not be the only criterion of rightful taxation.

The Supreme Court of Massachusetts, in *Jenkins v. Anderson*,⁷ cited and approved in the *Topeka* case, held to be unconstitutional a statute authorizing the authorities to aid a school established by the gift of a citizen, and governed by trustees selected by him, because the school was not under the control of the town authorities, and was not, therefore, a public purpose for which taxes could be levied on the inhabitants. It is pointed out that the Virginia legislature

met this objection by providing a "Board of Governors," appointed by the chief executive of the state, whose duty it was to keep a watch on the management and direct the policy of the corporation. The objection raised that this was no exception, but was a regularly organized corporation, is answered by the necessity for such regular board of directors that the corporation might have an orderly existence which, in no sense, detracted from its public nature. The board of governors represented the government in any event. That there was vested in the corporation the power to encumber its real estate with mortgages and deeds of trust did not affect its public nature because it was contended to be a necessary incident to its existence in the proper conduct of its affairs, and was a parallel case with that of the University of Virginia which had been declared to be a public institution, although a private corporation with authority to borrow money and issue bonds therefor, to be secured by a deed of trust on its property, which it accordingly did. In fact, the two instances seem to have much in common if not parallel.

The contention that there were private stockholders, possessing pecuniary interest, and who might derive a benefit from the investment in the event of successful operation, was answered in the language of Mr. Cooley in his work on constitutional limitations,⁸ namely, "Private pecuniary interest does not preclude their being regarded as public agencies in respect to the public good which is sought to be accomplished." Mr. Cooley cites railroads as an analogous case, built primarily for private gain, but which are, of necessity, public highways, and necessary both for the convenience and exploitation of the country.

It is interesting to note that Mr. Dillon gives the distinction of being the first case

(6) *Supra*.

(7) 103 Mass., 94.

(8) pp. 662, 267-8.

(9) 8 Leigh (Va.), 120 (1837.)

on this subject in the United States to *Goddin v. Crump*.⁹

Bearing in mind the words of Mr. Justice Miller, *supra*, there is additional authority in the case of *Santa Ana v. Harlen*,¹⁰ where it was held that "the legislative determination of what constituted a public use is unreviewable, except in extreme cases," and again, in *In re Madera Irrigation District*,¹¹ the opinion was expressed that "whether purpose of tax and appropriation is for a public or private purpose must be resolved in favor of a public purpose." This line of thought was followed in *State v. Connell*.¹²

In *Phillips v. State University*,¹³ President Keith delivering the opinion of the Court, it was said, "It is contrary to public policy to allow a lien to be acquired on public property. * * * The mechanics' lien laws of this state do not, in terms, embrace public buildings or structures, and, therefore, under the law as generally expounded, a mechanics' lien cannot be acquired on buildings erected by the state, its counties or cities, for public uses. * * *

The fact that the rector and visitors of the University of Virginia were given authority by the act of January 23, 1896, to borrow money and issue bonds therefor to be secured by a deed of trust on the property of the University to enable them to erect other buildings in the place of those destroyed by fire, and that the mechanics' lien was asserted by the appellant on the buildings so erected, does not alter the case—the principle is the same."¹⁴ It is also pointed out that prior to a recent statute so permitting, a mechanics' lien could not be filed against the property of a railroad in Virginia.

The same authorities, for the same reasons, hold that the lien of an execution will

not attach. What effect these objections will have upon the pleading and procedure is not now apparent.

THOS. W. SHELTON.

Norfolk, Va.

CONSTITUTIONAL LAW—BULK SALES
LAW OF 1905 HELD VOID.

OFF & CO. v. MOREHEAD.

Illinois Supreme Court, June, 1908.

The Bulk Sales act of 1905 (Laws of 1905, p. 284), is unconstitutional and is void in its entirety, since it imposes special burdens upon the vendor and purchaser of stocks of merchandise from which persons dealing in other classes of property are exempt, and deprives them of the privilege of contracting, which is both a liberty and property right.

This is an action in assumpsit and attachment brought by Charles J. Off & Co. against Della I. Morehead. A writ of attachment was issued upon an affidavit alleging that the defendant had within two years fraudulently conveyed and disposed of her property so as to hinder and delay her creditors, contrary to the provisions of an act entitled "An act to prevent sales of merchandise in fraud of creditors," approved May 13, 1905, and in force July 1, 1905. This attachment writ was levied upon a stock of groceries which had formerly belonged to the defendant. To the declaration in assumpsit, which consisted of the common counts, a plea of the general issue was interposed. The affidavit for attachment was traversed and issue joined on the traverse. After the seizure of the stock of merchandise by virtue of a writ of attachment, Wilbur Gehres, by leave of court, interpleaded, and by his interplea averred that the said stock of merchandise attached and seized by virtue of the writ of attachment was at the time it was so attached and seized, and still was, property of him, the said Wilbur Gehres, and not the property of the said Della I. Morehead. To the interplea Off filed a replication denying that the property seized was the property of the interpleader and averring the same to be the property of Della I. Morehead. This replication concluded to the country and upon it issue was joined. A jury was waived by the parties as to the issues on the declaration in assumpsit and the issues on the affidavit in attachment, and these issues were tried by the court. A jury was empaneled to try the issue on the interplea. Upon the hearing of that issue the jury found a verdict

(10) 99 Cal. 542, 34 Pac. Rep. 226.

(11) 92 Cal. 309, 27 Am. St. Rep. 113, 28 Pac. Rep. 274, 14 L. R. A. 761.

(12) 53 Neb. 559, 68 Am. St. Rep. 631, 74 N. W. Rep. 60, 39 L. R. A. 515; *Perry v. Keene*, 56 N. H. 532.

(13) 97 Va. 472, 34 S. E. Rep. 66.

(14) The court cites "*Bolsot on Mechanics Lien*," sec. 308 and "*2 Jones on Liens*," sec. 1375.

in favor of the interpleader. The court found for the plaintiff in the action of assumpsit and assessed his damages at \$228.81. Upon the issue as to the attachment the finding of the court was for the defendant. A judgment having been rendered upon the verdict of the jury finding Wilbur Gehres to be the owner of the stock of merchandise, the plaintiff in the attachment suit and defendant in the interplea duly excepted, and has perfected his appeal direct to this court on the ground that the constitutionality of the act of May 13, 1905, known as the "Bulk Sales Law," is involved.

The statute, the constitutionality of which is involved in this case, is as follows:

"Sec. 1. That a sale of any portion of a stock of merchandise, otherwise than in the ordinary course of trade or in regular and usual prosecution of the seller's business or a sale of an entire stock of merchandise in gross, will be presumed to be fraudulent and void as against the creditors of the seller unless the seller and purchaser shall at least five days before the sale make a full and detailed inventory showing the quantity, and so far as possible, with the exercise of reasonable diligence, the cost price to the seller of each article to be included in the sale, and unless such purchaser shall at least five days before the sale, in good faith, make full and explicit inquiries of the seller as to the names and places of residence or places of business of each and all of the creditors of the seller and the amount owing each creditor and unless the purchaser shall at least five days before the sale, in good faith, notify or cause to be notified personally or by registered mail, each of the seller's creditors of whom the purchaser has knowledge or can, with the exercise of reasonable diligence, acquire knowledge, of said proposed sale and of the said cost price of the merchandise to be sold and of the price proposed to be paid therefor by the purchaser. The seller shall at least five days before such sale fully and truthfully answer in writing each and all said inquiries.

"Sec. 2. Except as especially provided in this act, nothing therein contained nor any act thereunder, shall change or affect the present rules of evidence or the present presumptions of law."

The court below held the above statute unconstitutional and refused to allow the appellant to prove that the sale in question had been made without complying with the provisions of said act.

The facts in this case are not in dispute. Della I. Morehead borrowed \$500 from the

First National Bank of Lincoln, Illinois, with which she bought a small stock of groceries and engaged in the retail grocery business. She became indebted to Off & Co., of Peoria, for merchandise, to the amount of \$288.81. Her business appears to have been unsuccessful. She sold her entire stock of goods to Wilbur Gehres. An invoice of the stock was taken, and it was found that the stock was worth, at cost prices, \$296. Gehres paid her for the stock \$260. A horse and delivery wagon valued at \$100 were included in the sale, bringing the total sale price up to \$360. Gehres paid for the property by a check. Appellee applied the whole amount of the check on her note of \$500 to the bank. Appellee testifies that she found her business was unprofitable and that she desired to apply the proceeds of the merchandise on her debts, as far as the same would go. Appellee had mortgaged her homestead for the \$500 which she borrowed of the bank.

There is no contention that the sale of the stock of merchandise was fraudulent in fact. Appellant's sole contention is that the sale was made in violation of the Bulk Sales law, above set out, and for that reason it must be held fraudulent and void as to the creditors of appellee.

Mr. Justice Vickers delivered the opinion of the court:

The constitutionality of this statute is challenged on the ground that it is in conflict with sections 1 and 2 of the bill of rights. These sections are as follows:

"Sec. 1. All men are by nature free and independent, and have certain inherent and inalienable rights—among these are life, liberty, and the pursuit of happiness. To secure these rights and the protection of property, governments are instituted among men, deriving their just powers from the consent of the governed.

"Sec. 2. No person shall be deprived of life, liberty or property, without due process of law."

The statute in question singles out a particular class of persons and imposes burdens upon them from which all other classes are exempt. The persons thus affected are—they are not permitted to contract in respect to a particular kind of property subject to the same laws that are applicable to all other classes of property. The privilege of contracting is both a liberty and a property right, and a law which deprives a man or a class of the right to acquire and enjoy property upon the same terms and in the same manner permitted to the community at large is in violation of the constitutional rights of the

persons affected by such law. *Cooley's Const. Lim.* (1st ed.) 393; *Frorer v. People*, 141 Ill. 171.

"Due process of law" is synonymous with "law of the land," and it means a general public law, binding upon all members of the community under all circumstances, and not partial or private laws affecting the rights of private individuals or classes of individuals. *Millett v. People*, 117 Ill. 294; *Frorer v. People*, *supra*.

The legislature undoubtedly has the constitutional power to enact laws which, by reason of peculiar circumstances, may affect some persons or classes of persons only, but in such instances the class of persons upon whom the law is to operate must possess some common disability, attribute or qualification, or must occupy some condition marking them as proper objects for the operation of special or class legislation. *Gillespie v. People*, 188 Ill. 176; *Harding v. People*, 160 id. 459; *Ruhrstrat v. People*, 185 id. 133; *Starne v. People*, 222 id. 189.

The general principle running through all the cases is, that a statute which arbitrarily selects a class of individuals and subjects them to peculiar rules or imposes upon them special obligations or burdens from which other persons are exempt is unconstitutional. In the language of Judge Cooley, in his work on *Constitutional Limitations* (6th. ed. 481-483): "Everyone has a right to demand that he be governed by general rules, and a special statute which without his consent singles his case out as one to be regulated by a different law from that which is applied in all similar cases would not be legitimate legislation, but would be such an arbitrary mandate as is not within the province of free governments."

Meadowcroft v. People was a prosecution for embezzlement under the act for the protection of bank depositors, which provided, *inter alia*, that the "failure, suspension or involuntary liquidation of the banker, broker, banking company or incorporated bank within thirty days from and after the time of receiving such deposit shall be prima facie evidence of an intent to defraud, on the part of such banker, broker or officer of such banking company or incorporated bank." In that case the constitutionality of the statute was assailed on the ground that it was special legislation, in that it established a rule of evidence applicable only to a particular class of persons. That contention was answered by this court, speaking by Mr. Justice Baker, by pointing out that the business of banking is not *juris privati*, but is, like that of an inn-keeper or common carrier, affected with the

public interest and therefore subject to public regulation, and the law was sustained on the ground that there was manifest reason and necessity for protecting the community in their dealings with persons engaged in the banking business that do not exist with respect to their transactions with those employed in "the ordinary agricultural, manufacturing, merchandising and mining pursuits."

The only persons affected by this statute are persons who own "stocks of merchandise," and persons who may purchase a portion of such stock of merchandise in some manner other than in the ordinary course of business, or the entire stock of merchandise in gross. The words "stock of merchandise," in this statute, are used in the common and ordinary acceptance of those terms, and mean the goods or chattels which a merchant holds for sale, and are equivalent to "stock in trade" as ordinarily used and understood among merchants and tradesmen. The title of this act indicates its purpose to be the prevention of sales of merchandise is fraud of creditors. It cannot be seriously contended that a creditor of a merchant occupies a position of such peculiar concern that the passage of this act can be justified because of the inability of creditors of merchants to take care of themselves upon an equal footing with creditors of persons engaged in other lines of business. There is, furthermore, no reason pointed out, and none suggests itself to us, why sales of stocks of merchandise should be placed under the protection of a special statute imposing onerous restrictions and conditions upon both seller and buyer from which persons dealing in all other classes of property are exempt. This law has no application to a sale by a manufacturer of all his machinery, tools, finished articles and raw material; or by a farmer of all his live stock, farm implements, crops grown or growing, and household goods; or by a hotel keeper of his entire business and all the property therein; or by a livery or transfer company of all its rolling stock, harness and horses owned and used in the business; or by a publisher of all his presses and printing machinery and appliances; or by a mine owner of all the property owned and used in the mining business; or to a sale by a miller who may sell his business, mill machinery and the grain and its products on hand. On behalf of these and all others the law indulges the presumption of honesty and fair intentions in making sales, either in or out of the ordinary course of business, with or without an inventory, and in bulk or by

parts and parcels. If sales made of the various classes of property above referred to are presumed to be fair and honest, it is difficult to see why a sale of a stock of merchandise under similar conditions should be presumed to be fraudulent and void. There is no such actual, substantial difference between the members of the class of individuals upon whom this statute is intended to operate and the owners of other kinds of property as to warrant the legislature in passing an act applicable only to persons dealing in stocks of merchandise. The act in question is therefore special class legislation, which is prohibited by the constitution of 1870.

Statutes bearing more or less similarity to the one now under consideration have been enacted in a number of other states. The validity of these statutes appears to have been questioned in the courts of last resort in eight states and one territory. These courts have reached widely different results. Thus, in *Squire & Co. v. Tellier*, 185 Mass. 18, 69 N. E. Rep. 312, *Walp v. Moor*, 76 Conn. 515, 57 Atl. Rep. 277, *Neas v. Borches*, 109 Tenn. 398, 71 S. W. Rep. 50, *McDaniel v. Connelly Shoe Co.*, 30 Wash. 549, 60 L. R. A. 947, and *Williams v. Fourth Nat. Bank*, 15 Okla. 477, 6 A. & E. Ann. Cas. 970, statutes of the same general character as the one here involved have been held constitutional; while in *Block v. Schwartz*, 27 Utah, 387, 65 L. R. A. 308, *McKinster v. Sager*, 163 Ind. 671, 68 id. 273, *Miller v. Crawford*, 70 Ohio 207, 71 N. E. Rep. 631, and *Wright v. Hart*, 182, N. Y. 330, 75 id. 404, the opposite conclusion was reached and the statutes declared unconstitutional. We do not regard the question involved here as one to be determined upon the weight of authority outside of this state. We have so often expressed our views in regard to the clause of our constitution now under consideration, that its interpretation is settled by the previous decisions of this court too firmly to be departed from out of regard for opposing views in other states, however highly we may esteem them. Without regard to the question of the weight to be given to the conflicting decisions of other courts upon the question now in hand, we think the reasoning of those courts which have held such statutes unconstitutional on the ground upon which we rest our judgment in this case are more in harmony with the views of this court as expressed in the numerous cases, than are the reasons which are given by those other courts in which a different result has been reached.

Our conclusion is that the act in question is void in its entirety. It follows, there-

fore, that the court below committed no error in refusing the evidence offered to prove that the sale in question was not made in accordance with its provisions.

The judgment of the County Court of Logan County will be affirmed. Judgment affirmed.

Note—Constitutionality of the "Bulk Sales Law."—With the National Credit Men's Association definitely committed to an unremitting campaign for the adoption of the bulk sales law by the legislatures of all the states and the courts busy every day upholding or rejecting such legislation as unconstitutional without regarding the opinions of any other court or attempting to reconcile or answer each other's position, we have a picture that is possible only in the American republic where possible only in the American republic where the judiciary can not only nullify legislation but where the judiciary in one state will hold the same act void as violating the same constitutional provision which another court in another state will hold valid.

So it is with the bulk sales law. The constitutional provision which this law is alleged to contravene is that which prohibits a state from depriving any person of life, liberty or property without due process of law. This is a universal constitutional restriction in every state. But all courts do not agree on the question whether the bulk sales law violates this restriction or not. The supreme judicial tribunals in Massachusetts, Connecticut, Tennessee, Washington and Oklahoma say that it does not and is therefore valid and constitutional. The courts of New York, Ohio, Illinois, Indiana and Utah say it does and is therefore unconstitutional and void.

Where appellate tribunals are so divided surely mere legal editors should fear to tread.

Possibly no one will be inclined to disagree with the statement of Chief Justice Knowlton in *Squire v. Tellier*, 185 Mass., 18, 102 Am. St. Rep. 322, that "this law is a pretty stringent regulation of a certain class of sales." But it must be as readily admitted that with that feature of legislation the courts have nothing to do. The policy of legislation or its expediency are for legislative determination and should not be the subject of inquiry by any court. If the act does not violate any definite constitutional restriction upon legislative action it should be upheld no matter how crude, harsh or unwise it may be.

There is no doubt that this legislation singles out arbitrarily a uniform class of persons (retailers of merchandise) and imposes severe restrictions upon them which are not imposed on persons engaged in other business enterprises. It is therefore not invalid simply as class legislation because the act operates uniformly on all persons within a carefully designated class. But is such classification and regulation unnecessary and therefore oppressive and outside of the power of the legisla-

ture to enact even as a police regulation? For it cannot be contended for a moment by any court that the legislature can single out a class of people arbitrarily and impose heavy restrictions upon them arbitrarily and without reason. Thus, it could not be required by the legislature that butchers shall put red signs over their doors and grocers blue signs, without some good reason for distinguishing these two enterprises from all other enterprises. And so the kernel of the difficulty lies in the determination of the question as to whether there is any reasonable ground or distinction existing for the exercise of the power of the legislature in making special provisions for sales in bulk by retailers of merchandise. The supreme court of Connecticut in *Walp v. Moor* 76 Conn. 515, 57 Atl. Rep. 277, says: "The limitation of the act to retail dealers is not an arbitrary classification. The nature of the business described in the act is such as to furnish those conducting it opportunities of secretly selling their entire stock to the injury of those from whom they have purchased it on credit. The purpose of the act is to prevent fraud, and it is of the same general character as our laws requiring assignments of future earnings and conditional sales to be in writing and recorded. . . . The legislature has the undoubted power to adopt reasonable measures for regulating the sale of merchandise so as to prevent fraud."

The New York court of appeals in the case of *Wright v. Hart*, 182 N. Y. 330, 2 L. R. A. (new series) 338, takes a different view. It admits that the purpose of the act may be a good one but that in carrying out its purpose it omits other enterprises in which fraud is just as much to be apprehended. Thus the manufacturer as well as the merchant asks largely for credit and he can sell his whole plant no matter what his indebtedness may be and even with fraudulent intent but the honest retailer with only a few debts and with no intent to defraud a single creditor has imposed upon him restrictions as to inventory and notice to creditors which in these days of quick action amount to a prohibition to sell. The New York court holds therefore that there is no such preponderating apprehension of fraud to be entertained as to retail merchant debtors as distinguished from other debtors in other lines of business that will justify the legislature in singling out the retailers alone and imposing upon their liberty of contract, severe restrictions that apply to all cases of sales in bulk, irrespective of any fraudulent intent on the part of the seller.

We are inclined to agree with the position taken by the court in the New York case. This class of legislation designed to protect one class of our population against another is becoming too frequent. Why should the creditors of retail merchants be preferred by the legislature to the retail merchants themselves

and why should the latter class be presumed to harbor an intent to defraud rather than the former. Does not the big jobber as often defraud the retailer as the retailer does the jobber? Is either class any more honest than the other? Rather why not let both deal with each other at arm's length, as free men, each using the judgment of strong minds in extending credit or making purchases from the other.

This sort of legislation is not in any sense of that same character as the recording acts and the statute of frauds. These latter statutes are impersonal; they apply to no class of persons and are intended to prevent fraud generally among all classes of persons by requiring proper written or recorded evidences of certain transactions, otherwise difficult or impossible of proof. It deals with the evidences of a transaction not with the parties thereto, and applies uniformly to every transaction of the character described no matter who may be the parties thereto.

Let the bulk sales law apply uniformly on all sales or not at all. The law cannot be any respecter of persons and regard one class as more dishonest than another. Let such a law, if enacted at all, apply where a farmer sells his unharvested crop standing in the field, or where a jobber sells a large portion of his stock at bargain prices in order to raise a little money; and let the manufacturer where he proposes to sell the whole product of his plant to some jobber at a great reduction because he is overstocked, be compelled to take an inventory and gain the consent of all his creditors. You say this would be a ridiculous and unnecessary embargo on business enterprise. So it would be, and so it is on the business of the retail merchant under the present legislative scheme known as the bulk sales law.

CORRESPONDENCE.

LETTERS CRITICAL AND COMMENDATORY OF OUR EDITORIAL POSITION ON THE STANDARD OIL DECISION.

Editor Central Law Journal:

I am not a little surprised at your attitude regarding the Standard Oil decision. I supposed that lawyers and law journals, being necessarily and by education conservative, could not find any way for endorsing the extravagant views taken by the lower court. The corporation baiters (which include a certain class of damage suit and snitch lawyers) have been as vituperative about the decision of the appellate court as have the unreasonable rabbies, and how it can be that a law journal having regard for that justice which is tempered with moderation can make the departure that you have in criticising the appellate court, we do not understand. If causes are to be heard and determined in disregard of the ordinary rules of legal procedure, and if decisions of courts are to be the result of passion, prejudice and vicious rulings, and

there is no safeguard for their reversal, then certainly our jurisprudence has become a by-word. I think that neither a law journal nor a lawyer can afford to become contaminated with the prevalent attack upon the judiciary and the settled existing judicial procedure.

Truly yours,

JNO. A. EATON.

Kansas City, Mo.

II.

Editor Central Law Journal:

Your editorial discussion of the Standard Oil rebate case, and the relative merits of the decisions of Judges Landis and Grosscup, must provoke widespread comment, and, I think, on the whole, quite general approval.

As you well say, it was Judge Landis' construction of the law which made it effective; it was Judge Grosscup's interpretation of the law, which, if it prevails, renders the same law nugatory. Judge Landis' decision attempts to conserve the very best interests of government. That is what the judicial function is for. The law in question being considered constitutional, it was the plain duty of the bench to do, substantially, what Judge Landis did do. And it is idle to say that there was any miscarriage of justice, when it is conceded that the offense charged was committed. Ignorance of the statutory provision will not suffice. Crimes are never palliated, in a law abiding community, in that way.

Judge Benjamin's presentation of the other side of the legal question from the lawyer's standpoint, found in your issue of the 14th instant, is also an argument of great legal merit. To those who are looking for strong legal reasons for the views maintained by Judge Landis, this clean cut statement is well worth while.

Your editorial of the 7th instant, and Judge Benjamin's article of the 14th instant, need wider publicity.

DUANE MOWRY.

Milwaukee, Wis.

III.

Editor Central Law Journal:

I must take issue with your editorial views regarding the decision of the federal court of appeals in the Standard Oil case.

The three judges composing that court are unquestionably as able, conscientious and law-loving as Judge Landis and in addition of a much wider and more varied experience, not only as judges but as students of fundamental legal principles.

I should be very glad if the case could be carried to the United States supreme court, and if it reaches there, I feel quite confident that the decision of the court of appeals will be confirmed by a decisive majority, and I would not be at all surprised without a dissenting vote. I will add that if a principal can be held criminally liable for the acts of the agent, without himself being before the court by due process of law, then we have arrived at an unheard-of stage of judicial practice and precedent.

Very truly yours,

J. WM. JOHNSON.

Cincinnati, Ohio.

RIGHT OF EQUITY TO ENJOIN A MULTIPLICITY OF ACTIONS SOUNDING IN TORT AGAINST THE SAME DEFENDANT FOR THE SAME WRONG.

Editor Central Law Journal.

The supreme court of Alabama has just overruled an application by appellees for a

rehearing in the case of Southern Steel Co. v. Willey Hopkins. The decision in this case sustains the equity of a bill which was filed for the purpose of enjoining over one hundred actions at law for damages, sounding in tort, filed by the administrators of the estates of the unfortunate miners who were killed in a single explosion in a mine belonging to the defendant at law. The bill averred that the complainant (defendant in the actions at law) was not guilty of actionable negligence in causing the deaths of decedents, that it had a common defense to the actions at law, involving identically the same questions of fact and law, which could not be adequately presented in the numerous actions. This bill was held to disclose an equity for the prevention of a multiplicity of vexatious suits at law, and the chancellor's decree dissolving a preliminary injunction restraining the further prosecution of the actions at law was reversed. The case is one of primary interest and importance and is the first unequivocal declaration of this application of the general doctrine. I am taking the liberty of forwarding to you, under separate cover, a copy of my brief on rehearing, as it contains a copy of the original bill and of the opinion of the court. The opinion is sound and well sustained by reason and authority and it is my desire that it should receive appreciative annotation when it is commented upon in your excellent publication.

A highly interesting application of the doctrine of *Farmer v. Kearney*, 3 L. R. A. (N. S.) 1105, is disclosed by the bill (brief pp. 11 et seq; 56 et seq.), but the great significance of the case is found in the interesting application of the equitable doctrine for the prevention of a multiplicity of suits.

Respectfully calling your attention to the decision, I am,

Yours very truly,

FORNEY JOHNSTON.

Birmingham, Ala.

JETSAM AND FLOTSAM.

THE ABILITY OF LAWYERS TO DRAW WILLS.

The prime requisite of successful speechmaking is to attract attention, which may generally be done by saying something that will take the audience by surprise. It is not always easy to do this, especially on such occasions as the meetings of bar associations, but the statement reported to have been made in the course of an address before the New York Bar Association, that lawyers as a class were incompetent to draw wills so as to carry out the testator's wishes, was a success in the respect mentioned. The speaker said that he had examined hundreds of important wills, that he was astonished by the remarkably low standard of testamentary writing, that he was sure that not more than one-fourth of the wills of living persons are above reproach, and that fully fifty per cent. of such wills, if critically examined, would be found to contain some flaw, obscurity, or omission that on the happening of some contingency would defeat the testator's intention after death. It is very shocking to see the family skeleton of the profession exposed in this ruthless manner, and to learn that it is not testators who write their own wills, but the lawyers themselves, who create testament-

any problems for the courts to solve. There is good reason, however, to believe that the frustration of the testamentary intent is not so common. Statistics show that ninety-nine per cent. of all the wills propounded for probate are admitted and executed without question. When a contest is successful, it is probably more generally due to a desire of the testator to create limitations which the law does not permit than to the inability of the scrivener to express the testator's wishes. In other words, the failure of the testamentary effort in many instances results from the desire of the testator to exert a posthumous control over his estate, or to make a disposition contrary to the principles of natural justice. It might with equal truth be said that lawyers, as a class, do not know how to draw deeds or contracts, because such documents are sometimes found not to accomplish the purpose for which they were intended. And it might with even more truth be said that they do not know how to practice law at all, because nearly half of all the points decided in the reported cases relate to matters of pleading and practice.—Law Notes.

BOOK REVIEWS.

DEVLIN'S TREATY POWER.

A very live and important subject of law has just been put in form of a treatise by Mr. Robert T. Devlin, of the San Francisco bar. This new work is entitled, "The Treaty Power Under the Constitution of the United States." It is in the form of commentaries on the treaty clauses of the constitution; construction of treaties; extent of treaty making power; conflict between treaties and acts of congress, state constitutions and statutes; international acquisition of territory, ambassadors, consuls and foreign judgments; naturalization and expatriation; responsibility of government for mob violence and claims against governments, with appendices containing regulations of department of state relative to extradition of fugitives from justice, a list of treaties in force, with the international conventions and acts to which the United States is a party, and a chronological list of treaties.

The real occasion for this work was probably the sharp controversy that arose between the people of the state of California and the government of the United States over the construction of the Japanese exclusion treaty especially in relation to the right of Japanese residents of San Francisco to attend the public schools. We assume this because of the author's statement in his preface that he has "devoted special attention to the construction of treaties and the conflict between treaties and acts of congress, state constitution and statutes.

The skeleton outline of the work will show its scope and compass: Chapter I, treaty clauses of the constitution; chapter II, prohibition on states; chapter III, compacts between states; chapter IV, making of treaties; chapter V, taking effect and termination of treaties; chapter VI, federal question under treaty; chapter VII, construction of treaties and extent of treaty making power; chapter VIII, conflict between treaties and acts of

congress; chapter IX, state constitutions and statutes in conflict with treaties; chapter X, treaties by cession; chapter XI, treaties of extradition and proceedings thereunder; chapter XII, treaties with Indians; chapter XIII, ambassadors, consuls, consular courts and foreign judgments; chapter XIV, naturalization and expatriation; chapter XV, responsibility of government for mob violence; chapter XVI, claims against governments.

Printed in one volume of 864 pages and published by Bancroft-Whitney Co., San Francisco, Cal.

HUMOR OF THE LAW.

A lawyer who had been "jacked up" for speaking disrespectfully of the court, apologized in the following terms:

"Your honor, I retract what I said, for I find that you were right and I was wrong, as you usually are."

This, of course, was entirely soothing to the ruffled dignity of the court.—Law Notes.

"Witness, did you ever see the prisoner at the bar?"

"Oh, yes, very frequently. That is where I got acquainted with him."—Ohio Law Bulletin.

"Gimme ten cents' worth of Purden's Digest," said a lank, lean customer, as he threw down a dime in Sobieski Lusk's drug store recently.

"Ten cents' worth of what?" asked Lusk, thinking he had misunderstood.

"Purden's Digest, I said," replied the lean one.

"Purden's Digest," repeated Lusk, as his mind ran the gamut of all the digestive medicines of his store.

"Sorry, but I don't believe we keep it. Where did you hear about it?"

"Why, up in court last week. Them lawyers was all talking about it, and as they looked so sleek, I thought I would try some."—Lancaster Law Review.

WEEKLY DIGEST.

Weekly Digest of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of all the Federal Courts.

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1. **Abatement and Revival**—Causes Which Survive.—The nature of the damages sued for, rather than the form of the remedy, is the test for determining whether a cause of action survives the death of the wrongdoer.—*Hey v. Prime, Mass.*, 84 N. E. Rep. 141.

2. **Action**—Improper Joinder of Causes.—A cause of action on a bond and cause of action to foreclose the accompanying mortgage, where the execution on the personal judgment is returned unsatisfied, are improperly joined.—*City Real Estate Co. v. King*, 110 N. Y. Supp. 231.

3. **Allems**—Chinese Exclusion Act.—The deportation of a Chinaman admitted on a student's certificate in compliance with the treaty with China of December 8, 1894, art. 3, 28 Stat. 1210, cannot be ordered on the transcript of proceedings before the commissioner without any findings or the giving of any testimony.—*Fong v. United States*, U. S. S. C., 28 Sup. Ct. Rep. 576.

4. **Appeal and Error**—Abstracts and Record.—It was no excuse for the filing of a brief by appellee not complying with the court rules that opposing counsel in the appellate court filed an original brief containing only a short argument, and then in reply filed a brief containing a long argument on the facts.—*Schwitters v. Springer, Ill.*, 84 N. E. Rep. 497.

5.—**Finding of Trial Court**—In reviewing a decree of a territorial Supreme Court reversing a decree in a suit to cancel a corporate lease, the federal supreme court is confined to determining whether there was evidence supporting the findings of the trial court, and whether the facts found sustained the legal conclusions.—*Shawnee Compress Co. v. Anderson*, U. S. S. C., 28 Sup. Ct. Rep. 572.

6.—**Right to Review**—A receiver appointed on dissolution of a building association has no right of appeal from an order which merely affects the distribution of the funds in his hands.—*Knabe v. Johnson, Md.*, 69 Atl. Rep. 420.

7.—**Waiver of Error**—An exception as an entirety to a ruling on several requested instructions is insufficient to raise the correctness of that ruling.—*McCabe & Steen Const. Co. v. Wilson*, U. S. S. C., 28 Sup. Ct. Rep. 558.

8. **Attorney and Client**—Admission to Practice.—A Spanish lawyer may be denied permission to practice by the supreme court of the Philippine Islands, because not possessing the political qualifications required by law.—*Bosque v. United States*, U. S. S. C., 28 Sup. Ct. Rep. 501.

9. **Bailment**—Breach of Contract by Bailee.—Where plaintiff delivered to defendant a coat to be repaired and returned at a certain time, and defendant did not return it at that time, upon its being thereafter stolen, plaintiff may recover its value in an action for a breach of contract.—*Carl v. Goldberg*, 110 N. Y. Supp. 318.

10. **Bankruptcy**—Recovery of Property.—Securities held by stockholders as collateral may, where the customers are not indebted to the brokers, be recovered by the customers from the trustees in bankruptcy.—*Thomas v. Taggart*, U. S. S. C., 28 Sup. Ct. Rep. 519.

11.—**Return of Margined Stock**—No preferential transfer in violation of Bankr. Act. c. 541, 60a, held to result from action of stockbroker, who has pledged stock with the consent of the customer redeeming the stock and turning it over to such customer when insolvent.—*Richardson v. Shaw*, U. S. S. C., 28 Sup. Ct. Rep. 512.

12. **Bonds**—Negotiability.—Interest bonds attached to negotiable bonds held negotiable, and a plaintiff not chargeable with knowledge of their theft from another entitled to recover thereon.—*Greene v. Minzesheimer*, 110 N. Y. Supp. 429.

13. **Boundaries**—Title to Bed of Stream.—A patent from the United States describing land granted as bounded by the St. Mary's river carries with it the title to small, unsurveyed islands on the American side of the international boundary line.—*United States v. Chandler-Dunbar Water Power Co.*, U. S. S. C., 28 Sup. Ct. Rep. 579.

14. **Brokers**—Action for Compensation.—In an action to recover commissions on the sale of property, if plaintiffs' proposed purchaser would not purchase upon the terms agreed upon between plaintiff and defendants, plaintiffs could not recover any commission.—*Nadler v. Menschel*, 110 N. Y. Supp. 384.

15.—**Right of Commission**—Failure of prospective purchaser to rely on owner's representation to the broker held not to defeat broker's right to commission, where he finds a purchaser and the sale fails because of inaccuracy in representations.—*Dotson v. Milliken*, U. S. S. C., 28 Sup. Ct. Rep. 489.

16. **Carriers**—Contracts With Shippers.—A reduction of freight rates for dressed meats, making them lower than those charged for live stock, held not an undue and unreasonable preference.—*Interstate Commerce Commission v. Chicago Great Western Ry. Co.*, U. S. S. C., 28 Sup. Ct. Rep. 493.

17.—**Drunkenness of Passenger**—If a railway conductor knew that an alighting passenger was so drunk that he was unable to care for himself, the conductor should have dealt with him according to the condition he was then in.—*Mobile, J. & K. C. R. Co. v. Jackson, Miss.*, 46 So. Rep. 142.

18.—**Street Cars**—The prevalence of storm and freezing weather imposes upon a passenger an extra degree of care to prevent injury in alighting from a car.—*Riley v. Rhode Island Co.*, R. I., 69 Atl. Rep. 338.

19. **Commerce**—State Interference.—Commerce between states of New York and New Jersey held not unlawfully interfered with by Laws N. J. 1905, p. 461, c. 238, forbidding diversion of waters beyond the state.—*Hudson County Water Co. v. McCarter*, U. S. S. C., 28 Sup. Ct. Rep. 529.

20.—**State Taxation**—Business of taking orders on commission for purchase and sale of grain and cotton for future delivery and transmitting them to other states held not interstate commerce.—*Ware & Leland v. Mobile County*, U. S. S. C., 28 Sup. Ct. Rep. 526.

21. **Constitutional Law**—Due Process of Law.—Neither due process of law nor equal protection of the laws is denied by Laws N. J. 1905, p. 461, c. 238, under which riparian owner

may be prevented from diverting waters of a stream into another state.—Hudson County Water Co. v. McCarter, U. S. S. C., 28 Sup. Ct. Rep. 529.

22. **Contempt—Punishment.**—Though a corporation may have been technically guilty of a contempt, held, under the facts, not a fair exercise of the court's discretion to impose a penalty.—Grant v. Green Consol. Copper Co., 110 N. Y. Supp. 253.

23. **Contracts—Building Contracts.**—That the owner of a building upon which repairs had been made not in conformity with the terms of the contract uses the building does not operate as an acceptance of the work.—Pope v. King, Md., 69 Atl. Rep. 417.

24. **Oral Contracts.**—In an action on an oral contract of employment, where the proof showed a different contract from the one alleged and that difference brought the contract within the statute of frauds, defendant might avail of the statute as a defense without pleading it.—Bierman v. Simon, 110 N. Y. Supp. 267.

25. **Conversion—Intent of Testator.**—A direction in a will to sell for a particular object or with a view to a contingent event, which object cannot be accomplished, or if the contingency does not happen, will not work a conversion.—Painter v. Painter, Pa., 69 Atl. Rep. 323.

26. **Corporations—Actions.**—A corporation cannot recover on a contract entered into by defendant with a pre-existing copartnership of the same name and doing the same business in the absence of allegation or proof that the corporation succeeded to the business of the copartnership.—Candee & Smith v. Fordham Stone Renovating Co., 110 N. Y. Supp. 355.

27. **Recovery on Discounted Note.**—A trust company held entitled to recover on a note discounted by it through its president and director notwithstanding the knowledge of the president and director.—Lanning v. Johnson, N. J., 69 Atl. Rep. 490.

28. **Courts—Error to State Courts.**—A contention that certain instructions in a criminal case deprived accused of his liberty without due process of law does not raise a federal question under Const. U. S. Amend. 14, sufficient to sustain writ of error from federal supreme to state court.—Thomas v. State of Iowa, U. S. S. C., 28 Sup. Ct. Rep. 487.

29. **Covenants—Validity.**—A covenant inserted in several deeds, pursuant to a general scheme to restrict certain tracts to residence sites and covenanting against the erection of houses of amusement thereon, held not forbidden by statute or by public policy.—City of Baltimore v. Garrett, Md., 69 Atl. Rep. 429.

30. **Criminal Evidence—Homicide.**—Where the defense of an alibi is not set up, the state should not be permitted to argue to the jury that there is a great break in the pretended alibi.—Johnson v. State, Fla., 46 So. Rep. 154.

31. **Damages—Breach of Contract.**—Before a recovery can be had for breach of contract for the interruption or destruction of business, it must appear that the business was an established one.—Winslow Elevator & Mach. Co. v. Hoffman, Md., 69 Atl. Rep. 394.

32. **Nominal Damages.**—The damages for failure to perpetually renew a note is the remainder after deducting from the face the present value of a discharge from an obligation to pay in perpetuity the annual interest

of 6 per cent. on the face of the note.—Troutwine v. Hoff, 110 N. Y. Supp. 295.

33. **Divorce—Alimony.**—An order requiring defendant in a divorce suit to show cause why he should not be adjudged guilty of contempt for failure to pay alimony pendente lite held properly served on defendant's attorneys.—Welch v. Welch, 110 N. Y. Supp. 201.

34. **Elections—Violation of Election Laws.**—On a charge of knowingly aiding an act of illegal registration for the purpose of voting, the person who conceives the purpose of committing the crime of illegal registering and suggested to defendant the crime of aiding him held an accomplice of defendant, on whose testimony, unless corroborated, defendant could not be convicted.—People v. Acritelli, 110 N. Y. Supp. 430.

35. **Election of Remedies—Acts Constituting.**—Action against owner of property upon coupons for assessments for cost of municipal improvements on the owner's personal waiver held not an election of remedies precluding a subsequent enforcement of the liability against the property.—City of Indianapolis v. City Bond Co., Ind., 84 N. E. Rep. 20.

36. **Eminent Domain—Conditions Precedent to Action.**—The value of shade trees held properly included in the award of damages in condemnation proceedings to widen an avenue, though by the widening the trees would have constituted an obstruction to travel.—Green v. Town of Irvington, N. J., 69 Atl. Rep. 485.

37. **Rights of Grantor.**—Agreement whereby grantor retained right to sue for damages caused by elevated tracks constructed before his premises held to give him cause of action for fee damages, but not for rental damages thereafter accruing.—Anderson v. New York Cent. & H. R. R. Co., 110 N. Y. Supp. 232.

38. **Evidence—Judicial Notice.**—The federal supreme court will take judicial notice that distinctions between law and equity in a technical sense do not apply in the local law of Porto Rico.—Garzot v. Rios de Rubio, U. S. S. C., 28 Sup. Ct. Rep. 548.

39. **Presumptions.**—Where action is brought in the name of G. for price of goods sold by him, and he proves he was doing business in the name of the W. Company, held, it cannot, in the absence of evidence thereof, be presumed the company was a corporation or a partnership.—Grossman v. Lieb, 110 N. Y. Supp. 386.

40. **Fire Insurance—Estoppel.**—A waiver involves the conduct of one party, and is the intentional relinquishment of a known right without misleading the other party to his prejudice, while an estoppel involves the conduct of both parties and the misleading of one to his prejudice.—Webster v. State Mut. Fire Ins. Co., Vt., 69 Atl. Rep. 319.

41. **Fixtures—Bona Fide Purchaser.**—The bona fide purchaser of a building without notice of a vendor's claim for the purchase money of certain boilers installed in the building held to acquire title thereto as against vendor.—Fitzgibbons Boiler Co. v. Manhasset Realty Corp., 110 N. Y. Supp. 225.

42. **Homicide—Dying Declarations.**—A dying declaration in law is no more sacred than ordinary testimony, and is subject to discredit and impeachment by any competent testimony which impairs its value.—Gambrell v. State, Miss., 46 So. Rep. 138.

43. Indictment and Information—Grand Jury.—Where an indictment cannot be sustained as founded on insufficient evidence before the grand jury, but it is possible that the proof lacking can be supplied in dismissing the indictment, the court will direct that the matters therein be resubmitted.—*People v. Acritelli*, 110 N. Y. Supp. 430.

44. Injunction — Criminal Prosecution.—Equity held without jurisdiction at the instance of an exhibitor of moving pictures on Sunday, in alleged violation of the Sunday law, to restrain the police from entering the premises during such entertainment.—*Shepard v. Bingham*, 110 N. Y. Supp. 217.

45.—**Damages for Wrongful Issue**.—Where no bond was ordered or given on a preliminary injunction restraining defendant from disposing of letters patent which by the final decree they were allowed to retain, defendants are not entitled to an assessment of damages as for wrongful injunction.—*American Circular Loom Co. v. Wilson*, Mass., 84 N. E. Rep. 133.

46.—**Discretion of Court**.—A preliminary injunction should not be granted where, on the showing made, the complainant's right is quite doubtful, and it appears that at least as much injury would result to defendant from granting it as to complainant from its refusal.—*Richards v. Meissner*, U. S. C. C., W. D. Mo., 158 Fed. Rep. 109.

47.—**Illegal Acts of State Officers**.—The legality of the acts of the pure food commissioner and the question whether he is exceeding his powers may be tested in an action to enjoin alleged illegal acts.—*State v. District Court*, in and for Cass County, N. D., 115 N. W. Rep. 675.

48.—**When Granted**.—An injunction will not be granted where the chancellor finds that it would do greater injury than would result from leaving plaintiff to his redress in an action for damages.—*Berkey v. Berwind-White Coal Min. Co.*, Pa., 69 Atl. Rep. 329.

49. Insane Persons—Inquisition.—In the absence of statute, the rule is that the chancery or probate court of the place of residence of a supposed lunatic is the proper forum to conduct an inquiry as to his mental state.—*State v. Wurdeman*, Mo., 108 S. W. Rep. 144.

50. Insolvency—Fraudulent Transfers.—In an action by an assignee in insolvency to recover for cigars sold by insolvents at a sacrifice, evidence as to the profit of the buyers held admissible.—*Jaquith v. Davenport*, Mass., 84 N. E. Rep. 125.

51. Interstate Commerce—Regulation By State.—Act 1905, Gen. Laws 1905, p. 29, c. 25, regulating the venue of suits against common carriers, held a proper exercise of the state's police power, and not a regulation of interstate commerce.—*St. Louis, I. M. & S. Ry. Co. v. Boshear*, Tex., 108 S. W. Rep. 1032.

52. Judges—Right to Jury Trial.—Since the chancellor has exclusive jurisdiction of proceedings to compel an assignee for the benefit of creditors to settle his account, he has jurisdiction to decide without a jury issues of fact involving the misconduct of the assignee in the management of the estate.—*Cominger v. Louisville Trust Co.*, Ky., 108 S. W. Rep. 950.

53. Judgment—Conformity to Pleadings.—In a suit by a taxpayer to recover from a county any legal tax, the court under the pleadings and evidence held without authority to enter a decree perpetually enjoining the county from asserting a right to the tax and

to adjudge costs against it.—*Nashville, C. & St. L. Ry. Co. v. Marion County*, Tenn., 108 S. W. Rep. 1058.

54.—**Power of Court**.—Where plaintiff prevents defendants from carrying out the requirements of a judgment in time to avoid a penalty, the court may add an appropriate provision to the judgment, or may stay the operation of the portion thereof relating to the time for performing its provisions.—*Groge v. Ruff*, 110 N. Y. Supp. 259.

55.—**Res Judicata**.—An action may be brought by the assignee of a part of a claim without bringing in other parties, if the debtor consents to the action, and such action will not be a bar to another action, but this cannot be done against the objection of the debtor.—*Dickson v. Tyson*, 110 N. Y. Supp. 269.

56.—**Res Judicata**.—A final order for the landlord in summary proceedings to recover possession held conclusive as between the parties in a subsequent proceeding to recover rent as to the existence and validity of the lease, the tenant's occupation, and that the rent was due at the date of the order as specified therein.—*Lewy v. Wolfman*, 110 N. Y. Supp. 256.

57.—**Res Judicata**.—An action between the same parties concerning the same matter held not conclusively barred under certain conditions by a prior action.—*Mulcahy v. Dieudonne*, Minn., 115 N. W. Rep. 636.

58. Jury—Juvenile Courts.—House Enrolled Bill No. 418 of 1907, Loc. Laws 1907, p. 981, No. 684, establishing a juvenile court, and in section 14, p. 988, providing for a trial and fine of a delinquent child by a jury of 6 provided by section 5, held to violate Const. art. 6, 28, providing for a jury of 12 men in courts of record in criminal prosecutions.—*Robison v. Wayne Circuit Judges*, Mich., 115 N. W. Rep. 682.

59. Landlord and Tenant—Failure to Execute Renewal of Lease.—Occupation of property by a tenant after it was taken under condemnation held no ground for reducing damages due from the former owner, who had failed to execute a renewal of a lease of the property in accordance with a prior agreement.—*Niederstein v. Cusick*, 110 N. Y. Supp. 287.

60.—**Injuries From Defective Conditions**.—The owner of certain premises held not liable for injuries to the wife of a subtenant thereof, caused by the fall upon her of sheets of tin claimed to have come from the roof, such owner not being responsible therefor, even though the accident were due to the negligence of his tenant.—*Kooperberg v. Sussman*, 110 N. Y. Supp. 319.

61.—**Lease of Way**.—A lease of a way executed by a vendor to the purchaser held not to permit the vendor to obstruct the way by the erection of a closet thereon.—*Sultzman v. Branham*, Mo., 108 S. W. Rep. 1074.

62. Limitation of Actions—Applicability to Claim.—If equity has jurisdiction of an action to recover back money paid in satisfaction of a mortgage on the ground of lack of consideration, its jurisdiction is concurrent with courts of law, and the statute of limitations applies.—*Sternberg v. L. Sternberg & Co.*, N. J., 69 Atl. Rep. 492.

63.—**Fraud as Ground of Action**.—The statute of limitations does not bar reformation of a deed for fraud or mistake where the action is brought within 10 years from its execution and within 5 years from discovery of

the fraud or mistake, and the discovery could not have been sooner made.—*Morgan v. Combs*, Ky., 108 S. W. Rep. 272.

64. **Malicious Prosecution—Necessity.**—The termination of a criminal prosecution essential to authorize an action for malicious prosecution therefor may be either by acquittal or by dismissal of the charge or by the refusal of the prosecutor to proceed further.—*Halberstadt v. New York Life Ins. Co.*, 110 N. Y. Supp. 188.

65. **Mandamus—Acts of Officers.**—In the absence of statute, mandamus does not lie against an unincorporated association to compel the admission of an applicant for membership or to restore a member who has been expelled.—*Doyle v. Burke*, R. I., 69 Atl. Rep. 362.

66. **Marshaling Assets and Securities—Enforcement.**—Whether a creditor should resort to other property before resorting to the debtor's property held not determinable in an action to set aside a mortgage on the debtor's property to which persons interested in the other security are not parties.—*Foley's Trustee v. Foley*, Ky., 108 S. W. Rep. 270.

67. **Master and Servant—Care Required in Selecting Servants.**—The duty of using ordinary care in the selection of servants is one personal to the master; and failure to use such care to discover incompetency is a breach of duty, and, if it be the proximate cause of injury to another servant the master is liable.—*El Paso & S. W. Ry. Co. v. Smith*, Tex., 108 S. W. Rep. 988.

68. **Contributory Negligence.**—A locomotive fireman is not a fellow servant with the superintendent of construction and the foreman of a bridge gang.—*McCabe & Steen Const. Co. v. Wilson*, U. S. S. C., 28 Sup. Ct. Rep. 558.

69. **Master's Liability.**—Where plaintiff was hired by defendant as a farm hand to work in a barn, he agreed impliedly to work in the barn as it then was, unless there was some hidden defect that would not have been obvious upon inspection.—*Smith v. Lincoln*, Mass., 84 N. E. Rep. 498.

70. **Operation of Trains.**—An employee of a railroad company in charge of a train about to cross the tracks of another company may presume that the employees of the latter company in control of an approaching engine will obey the law, and stop before reaching the crossing.—*El Paso & S. W. R. Co. v. Murtie*, Tex., 108 S. W. Rep. 998.

71. **Unguarded Machinery.**—An employer who fails to perform the statutory duty of guarding dangerous machinery which could be guarded may avail himself of the contributory negligence of an employee injured by coming in contact with the machinery.—*Huss v. Heydt Bakery Co.*, Mo., 108 S. W. Rep. 63.

72. **Mines and Minerals—Oil and Gas Lease.**—A lease of land to enter and prospect for oil and gas, which provides that the lessee may surrender the lease is not void for want of mutuality, even though the power of revocation deprived the lessee of the right to specific performance.—*Watford Oil & Gas Co. v. Shipman*, Ill., 84 N. E. Rep. 53.

73. **Miscellaneous Insurance—Fidelity of Employees.**—A statement that an employee's accounts have been examined up to a certain date and found correct is material to the undertaking of an insurer of the fidelity of such employee, and, if false, the insurer, relying thereon, is not liable.—*Glidden v. United States*

Fidelity & Guaranty Co., Mass., 84 N. E. Rep. 143.

74. **Monopolies—Restraint of Trade.**—A compress company financially embarrassed cannot lease its property and good will to a foreign corporation with a covenant to discourage competition against its tenant and to refrain from engaging in the business of compressing cotton within 50 miles of any plant operated by the tenant.—*Shawnee Compress Co. v. Anderson*, U. S. S. C., 28 Sup. Ct. Rep. 572.

75. **Mortgages—Assignments.**—Receipt of an interest payment from a mortgagor held not to be a waiver of the mortgagee's right to declare the mortgage due when the taxes were due and unpaid at the time, but he did not know it.—*Bergman v. Fortescue*, N. J., 69 Atl. Rep. 474.

76. **Conveyance to Mortgagee.**—A mortgagee of realty who subsequently obtained a conveyance of the property subject to the mortgage, with a provision against merger making the property primarily liable, held not precluded from foreclosure by the fact of his holding the title to the premises.—*Egan v. Engeman*, 110 N. Y. Supp. 366.

77. **Redemption of Land Sold.**—Where on redemption of land sold on foreclosure defendant is allowed interest on the amount due, he is not entitled to the rents and profits while in possession.—*Potter v. Schaffer*, Mo., 108 S. W. Rep. 60.

78. **Municipal Corporations—Closing Streets.**—Where the municipal authorities believed that the safety of the public demanded it, it was in their power to order the closing of a street, and their action could not be interfered with by a citizen, who, if he were specially damaged, had his recourse against the municipality.—*Poythress v. Mobile & O. R. Co.*, Miss., 46 So. Rep. 139.

79. **Improvements.**—A property owner held not required to restrain pavement of a street by injunction, the proceedings being jurisdictionally defective, but entitled to raise the objection in a suit to foreclose the assessment.—*Zorn v. Warren-Scharf Asphalt Pav. Co.*, Ind., 84 N. E. Rep. 509.

80. **Insurance.**—A city held entitled to recover from an insurance company municipal funds paid to it by the city treasurer for individual purposes.—*City of Newburyport v. Fidelity Mut. Life Ins. Co.*, Mass., 84 N. E. Rep. 111.

81. **Street Improvements.**—A construction company having failed to carry out its contract for street improvements, it was held competent for the city council to contract with another company to complete the unfinished work.—*City of Auburn v. State Ind.*, 83 N. E. Rep. 997.

82. **Names—Identity.**—Where there was no issue as to the identity of a person who executed and acknowledged an instrument, the error of the notary in writing both in the signature to the instrument and in the certificate of acknowledgment an incorrect name of the person was immaterial.—*Taylor v. Silliman*, Tex., 108 S. W. Rep. 1011.

83. **Negligence—Duty to Use Care.**—A person is not required to anticipate and provide against that which is only remotely or slightly probable.—*Chicago & E. R. Co. v. Dinus*, Ind., 84 N. E. Rep. 9.

84. **Exposure to Danger.**—To justify exposure to danger for the purpose of saving

life there must be imminent danger to the person sought to be saved, and the method adopted must not be rash or reckless in the judgment of prudent persons.—*Wilson v. New York, N. H. & H. R. Co.*, R. I., 69 Atl. Rep. 364.

85.—**Failure to Keep Premises in Repair.**—Where a plumber went to defendant's establishment to buy a piece of pipe, and upon the invitation of one in authority went to the top of the building to get it, and in coming down a dark flight of stairs was injured by tripping over a large spike projecting from a landing, defendant was liable.—*Roth v. G. A. Feld Co.*, 110 N. Y. Supp. 427.

86.—**Places Open to Public.**—A water company held not liable for the death of a nine year old boy caused by falling from a floating foot bridge across the company's canal.—*Indianapolis Water Co. v. Harold, Ind.*, 83 N. E. Rep. 993.

87.—**What Constitutes.**—A person injured by the falling of a trunk which he had assisted defendant's employee to elevate from a basement held not entitled to recover because of defects in the trunk handle.—*Childs v. American Express Co.*, Mass., 84 N. E. Rep. 128.

88.—**Pardon—Conclusive Evidence.**—Where one of the conditions of a pardon for the crime of larceny is that the convict should thereafter lead a law-abiding life, and he is subsequently convicted of a second larceny such subsequent conviction is conclusive evidence of the violation of such condition in such pardon.—*Henderson v. State, Fla.*, 46 So. Rep. 151.

89.—**Parties—Rights of Plaintiff.**—The court cannot compel plaintiff to accept as a defendant a person against whom no summons has been issued, because that person was served with process.—*American Oilcloth Co. v. Slonov*, 110 N. Y. Supp. 289.

90.—**Partnership—Dissolution.**—On the dissolution of a partnership where a firm indebtedness to one partner is established, fixing a lien upon the share of the other for the entire indebtedness and authorizing execution for the full amount against such share held error.—*Meeve v. Eberhardt, Tex.*, 108 S. W. Rep. 1013.

91.—**Party Walls—What Constitutes.**—Where a wall is a party wall, neither of the adjacent owners may maintain windows therein, and equity will enjoin the maintenance thereof, and require the restoration of the wall to a solid wall.—*Kiefer v. Dickson, Ind.*, 84 N. E. Rep. 523.

92.—**Principal and Agent—Rights of Undisclosed Principal.**—An undisclosed principal in a contract of sale of personality may enforce the same against the buyer, irrespective of whether or not the buyer knew that the ostensible seller was or was not an agent.—*Kilpatrick v. America West Africa Trading Co.*, 110 N. Y. Supp. 381.

93.—**Process—Remedy of Person Wrongfully Served.**—Where a person against whom no summons has been issued is served with process, he may appear to indicate that the summons has been served upon the wrong person, and, if plaintiff refuses to withdraw the summons, he may answer, and have the complaint dismissed, or he may move to set aside the service.—*American Oil Cloth Co. v. Slonov*, 110 N. Y. Supp. 289.

94.—**Property—Secret Formula.**—The inventor of an unpatented secret formula is entitled to maintain the secrecy, and to prevent its disclosure or use by one who obtained knowl-

edge of it through fraud or breach of contract.—*O'Bear-Nester Glass Co. v. Antiexpio Co.*, Tex., 103 S. W. Rep. 967.

95.—**Public Lands—Title to Bed of Stream.**—A patent from the United States invalid when made after five years must be deemed to have the same effect against the United States in a suit to remove a cloud as though valid when issued, in view of Act March 5, 1891, c. 561, sec. 8, 26 Stat. 1099.—*United States v. Chandler-Dunbar Water Power Co.*, U. S. S. C., 28 Sup. Ct. Rep. 579.

96.—**Railroads—Highway Crossings.**—Where a railroad company constructed an underneath passage under a charter provision requiring it to keep the same in repair, it was bound to keep the pavement in such passage in repair.—*Borough of Metuchen v. Pennsylvania R. Co.*, N. J., 69 Atl. Rep. 465.

97.—**Injuries to Employees.**—Where a railroad maintains a post too near the track to be safe for brakemen on passing freight trains, it is liable for an injury to an employee resulting therefrom unless the employee knew of the danger or had competent means of knowing it.—*Wilson v. New York, N. H. & H. R. Co.*, R. I., 69 Atl. Rep. 364.

98.—**Negligence.**—In an action against a railroad for injuries to a pedestrian, the manner of submitting the negligence proximately causing the injuries held not prejudicial.—*Chicago, R. I. & G. Ry. Co. v. Johnson, Tex.*, 108 S. W. Rep. 964.

99.—**Negligence.**—If a window of a railroad car falls because the latch is defective, and inflicts injury to a passenger, the carrier is prima facie guilty of negligence.—*Cleveland, C. C. & St. L. Ry. Co. v. Hadley, Ind.*, 84 N. E. Rep. 13.

100.—**Receivers—Appointment Without Notice.**—A receiver may be appointed without notice if the defendant is beyond the jurisdiction or cannot be found, or some emergency exists under which a receivership is necessary to prevent waste, destruction, or loss of property.—*Mann v. Gaddle, U. S. S. C. of App.*, Fifth Circuit, 158 Fed. Rep. 42.

101.—**Removal of Causes.**—Consent to Federal Jurisdiction.—Plaintiff must be deemed to have consented to the jurisdiction of the federal circuit court over a suit removed from a state court on defendant's petition, where he files an amended petition in the federal court, and signs stipulations for continuances.—*In re Moore, U. S. S. C.*, 28 Sup. Ct. Rep. 585.

102.—**Sales—Consideration.**—Where one makes a proposition to do something provided the other performs a certain act, the performance of that act is a sufficient consideration to compel the proposer to perform.—*Ganss v. J. M. Guffey Petroleum Co.*, 110 N. Y. Supp. 176.

103.—**Schools and School Districts—Salary of Teacher.**—The principal of a private incorporated school and the high school of a city, which were administered together, held not entitled to recover a portion of his salary from the trustees of the private school as on an express contract.—*Dickey v. Trustees of Putnam Free School, Mass.*, 84 N. E. Rep. 140.

104.—**Shipping—Delay in Moving Vessel.**—A charterer bound by the contract to furnish the vessel with a berth for discharging held liable for extra wharfage which the master was obliged to pay at a designated berth, and also for overtime paid to a government inspector due to delay in discharging for which he was responsible.—*Hammitt v. Chase, Talbot & Co.*, U. S. D. C., S. D. N. Y., 158 Fed. Rep. 203.

105. **Specific Performance**—Oil and Gas Lease.—A lease of land to enter and prospect for oil and gas, which provides that the lessee may surrender the lease, is not void for want of mutuality, even though the power of revocation deprived the lessee of the right to specific performance.—*Watford Oil & Gas Co. v. Shipman*, Ill., 84 N. E. Rep. 53.

106. **States**—Fraud of Officers.—False statements by one of three prison commissioners are not the statements of the board, and the state is not responsible in damages for such false statements.—*Albin Co. v. Commonwealth*, Ky., 108 S. W. Rep. 299.

107. **Statutes**—Mistake in Wording.—Apparent mistakes in the wording of a statute will be considered as corrected, where the other provisions of the act or the legislative journals furnish the means of correcting the same so that the intention of the legislature is clearly manifest.—*State v. Brackin*, Ala., 45 So. Rep. 841.

108. **Street Railroads**—Injuries to Pedestrians.—Care to be exercised by operators of street cars and pedestrians crossing the street held to depend on the character of the street, its congested condition, and the frequency of the running of the cars.—*Boyce v. New York City Ry. Co.*, 110 N. Y. Supp. 393.

109. **Negligence**.—In an action for injuries to a street car passenger caused by the collision of the car with a locomotive at a crossing, where the rate of speed of the street car while approaching the crossing had to be taken into account in considering whether the locomotive was visible to the motorman, and there was no evidence as to its rate of speed, the usual rate could be assumed.—*Lindenbaum v. New York, N. H. & H. R. Co.*, Mass., 84 N. E. Rep. 129.

110. **Operation**.—Where the condition of the street will not permit driving outside of the car track, it is not negligence to drive in an easterly direction on the east-bound track with the curtains of the wagon fastened down.—*United Rys. & Electric Co. of Baltimore City v. Cloman*, Md., 69 Atl. Rep. 379.

111. **Subrogation**—Persons Making Voluntary Payments.—Administrator paying out of his own money interest on mortgages and taxes held not subrogated to the rights of the persons to whom the payments were made.—*In re Bernstein's Estate*, 110 N. Y. Supp. 473.

112. **Sunday**—Validity of Contracts.—Though a contract made on Sunday for the transmission of a message may have been void the telegraph company affirmed it by delivering the message on a subsequent week day.—*Hoyt v. Western Union Telegraph Co.*, Ark., 108 S. W. Rep. 1056.

113. **Taxation**—Assessment.—Coal brought into the state and stored for an indefinite period, subject to orders for future sale and delivery held liable to local taxation while awaiting orders for shipment.—*Susquehanna Coal Co. v. Borough of South Amboy*, N. J., 69 Atl. Rep. 454.

114. **Constitutional Provisions**.—It is within the power of the legislature to exempt corporate property from a property tax in order to avoid double taxation where a reasonable excise tax under Const. pt. 2, c. 1, sec. 1, art. 4, is lawfully imposed thereon.—*In re Opinion of the Justices*, Mass., 84 N. E. Rep. 499.

115. **Exemptions**.—Property purchased for an institution of learning whose property is

exempt from taxation, the title to which is held by a third person until the institution can pay the price, is subject to taxation while the title is so held.—*Peop'e v. St. Francis Xavier Female Academy*, Ill., 84 N. E. Rep. 55.

116. **Telegraphs and Telephones**—Damages for Failure to Deliver Message.—Measure of damages for failure of telegraph company to deliver a message, whereby plaintiff lost the sale of a horse, stated.—*Hoyt v. Western Union Telegraph Co.*, Ark., 108 S. W. Rep. 1056.

117. **Trespass to Try Title**—Proceedings.—In trespass to try title, evidence of the cutting of timber and other acts of ownership by defendants and of nonclaim and nonassertion of ownership by grantor and those under whom she claims any interest in the land for over 30 years should have been submitted to the jury.—*Hirsch v. Patton*, Tex., 108 S. W. Rep. 1015.

118. **Suit to Try Title**.—In a suit to try title between the grantees of the decedent's heirs and the grantees of her administrator, a deed held properly admitted in evidence and sufficient to pass the title to the land described therein.—*Fields v. Burnett*, Tex., 108 S. W. Rep. 1048.

119. **Trial**—Inferences.—While nothing will be inferred by the court in aid of facts specially found by the jury, inferences by the jury, where the facts in the absence thereof are uncertain, may become ultimate essential facts.—*Zeller, McClelland & Co. v. Wright*, Ind., 83 N. E. Rep. 1030.

120. **Instructions Ignoring Issues**.—In an action for loss from defendant's failure to furnish cars as agreed for transporting cattle to market, there being evidence showing a ratification of an agreement by defendant's agent to furnish the cars, an instruction ignoring the issue of ratification was properly refused.—*St. Louis, I. M. & S. Ry. Co. v. Boshear*, Tex., 108 S. W. Rep. 1032.

121. **Special Charges**.—Where an issue is fully presented in the charge of the court, there is no necessity for repeating it in a special charge.—*Herring v. Galveston, H. & S. A. Ry. Co.*, Tex., 108 S. W. Rep. 977.

122. **Trover and Conversion**—Action for Trespass.—A cause of action for trespass to land and conversion of personalty wherein the only damage alleged is the loss of the value of the personalty, is the same as a cause of action for conversion of personalty.—*United States v. Ute Coal & Coke Co.*, U. S. C. of App., Eighth Circuit, 158 Fed. Rep. 20.

123. **Damages Recoverable**.—One electing to sue for the value at the time it was converted of timber wrongfully cut from his land may recover the value of the property at the time it was taken with interest from such time.—*Dennis Bros. v. Strunk*, Ky., 108 S. W. Rep. 957.

124. **Waters and Water Courses**—Flooding Lands.—A town collecting surface waters in a channel along a street, and then obstructing the channel, thereby causing the waters to flow on adjacent property, is liable for the injuries sustained.—*Incorporated Town of North Judson v. Lightcap*, Ind., 84 N. E. Rep. 519.

125. **Wills**—Claim Against Estate.—A receipt for household goods held under the circumstances not to estop a legatee thereof from asserting a much larger claim against the estate.—*Alderding v. Allison*, Ind., 83 N. E. Rep. 1006.

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RIGHT OF A STATE TO CONVEY TITLE
TO TIDE LANDS OR EXCLUSIVE PRIVI-
LEGE TO PLANT OYSTERS, OR TO CON-
DUCT ANY OTHER PRIVATE ENTER-
PRISE THEREON.

Quite an interesting question, and one of considerable importance to residents along the coast lines of our southern states is ably handled by Judge Whitfield of the Supreme Court of Florida in the recent case of *State v. Gerbing*. The question in this case involves the right of the state to convey the title to tide lands to individuals, or to grant exclusive privileges to private enterprises to plant oysters thereon, or to conduct thereon any other business not especially charged with a public interest.

It is fortunate that a question of such momentous importance should have come before a jurist of such splendid attainments as Judge Whitfield, and that he should have written the opinion setting accurately the landmarks for future guidance.

In this case the defendant is sought to be ousted from the possession of certain tide lands along the Amelia river, in the State of Florida, which he had staked off for the purpose of planting them with oysters. The tide lands did not extend into the channel of the Amelia river, but were low mud flats over which the tide ebbed and flowed between high and low water mark. The defendant claimed that these lands were marsh lands, and that he had a conveyance from the state especially, conveying to him the title to such lands up to the channel of the Amelia river, and that in addition thereto he had

granted to him the privilege of planting oyster beds in lands adjoining his property.

Judge Whitfield, in a decision reversing a judgment of the lower court in favor of the defendant, shows by a short argument, which is a model of exact logic, that tide lands constitute the shores of navigable waters, and even though covered and uncovered alternately by the action of the tides, they are, nevertheless, the beds of navigable rivers in which such tide ebbs and flows, the learned judge, saying that "the navigable waters in the states and the lands under such waters including the shore or lands between ordinary high and low water marks are the property of the states or of the people of the states in their united or sovereign capacity, and are held not for the purposes of sale or conversion into other values, or reduction into several or individual ownership, but for the use of all the people of the states respectively for the purpose of navigation, commerce, fishing and other useful purposes afforded by the waters in common to and for the people of the states."

The most difficult question which the court had to meet was the argument of the defendant by which he set up the cession by congress to the new state of Florida of all the swamp and "overflowed" land within its borders as a source of the right of the state to grant to him title to the overflowed lands near the mouth of the Amelia river.

After first laying down the proposition that "a patent issued by the United States to the state purporting to convey swamp and overflowed lands under the act of 1850 covering lands under navigable waters of the state did not affect the title held by the state to lands under navigable waters by virtue of the sovereignty of the state," the learned judge proceeds, with remarkable clearness to distinguish swamp and overflowed lands which a state may dispose of to individuals for private exploitation and tide lands which a state can hold and dispose of only in its sovereign

capacity, and for public or quasi public purposes. The Court said:

"Swamp and overflowed lands within the State of Florida, not under navigable or tide waters, that became the property of the United States by the treaty of cession from Spain and had not been previously granted, were by the act of Congress approved September 28, 1850, granted to the state for purposes of drainage and reclamation. Within the meaning of this act of Congress, swamp lands, as distinguished from overflowed lands, are such as require drainage to dispose of needless water or moisture on or in the lands in order to make them fit for successful and useful cultivation. Overflowed lands are those that are covered by non-navigable waters or are subject to such periodical or frequent overflows of water, salt or fresh (not including lands between high and low water marks of navigable streams or bodies of water nor lands covered and uncovered by the ordinary daily ebb and flow of normal tides or navigable waters), as to require drainage or levees or embankments to keep out the water, and thereby render the lands suitable for successful cultivation. When the lands are not covered by the waters of navigable streams or other bodies of navigable waters at ordinary high water mark, and drainage, reclamation or leveeing is necessary to render the lands suitable for the ordinary purposes of husbandry, they are within the terms of the act of congress, and the title passed to the state, if the lands were the property of the United States at the time of the act of congress, making the grant to the state."

The opinion in this case is an effective declaration of the inviolability of the rights of the public in the navigable waters of the states. Too often our legislatures are prone to bargain away the public birth-rights for some mess of pottage. Such a decision as this imposes a wholesome restriction on legislative extravagance, and charges our legislators to a careful consideration of their obligation as trustees of the public domain.

NOTES OF IMPORTANT DECISIONS

STREET RAILROADS—LIABILITY FOR CROWDED CONDITION OF CARS.—*Dunham v. Public Service Corporation of N. J.* (N. J.), 69 Atl. Rep. 1012, discusses the duty which a street car company owes passengers who suffer injuries due to the crowded condition of the cars. The declaration alleged that the street car company carelessly and negligently suffered and permitted its cars, exits and running boards to be greatly crowded with passengers, whereby plaintiff while attempting to alight was thrown and injured. Demurrer was interposed, thus raising the question of whether or not the allegation stated facts sufficient to constitute a cause of action. On this point the court says:

"The argument that if plaintiff entered the crowded car he thereby contributed to his injury is not presented by a proper construction of this declaration, for the fair inference is that the plaintiff entered, and the defendant then suffered its car to become crowded, thereby creating a condition which, under the case of *Hansen v. North Jersey Street Railway Company*, 64 N. J. Law, 697, 46 Atl. Rep. 718, imposed liability upon the defendant. Nor can we say, in the light of the doctrine enunciated in that case, that a passenger by entering a public conveyance more or less crowded, his fare being accepted, and the relation of passenger and carrier having been thereby created, *ipso facto* was charged with negligence. We should say, rather, that the condition is akin to that presented by a passenger who stands upon the running board of a crowded car. There, it may be truly said, the danger is obvious, and yet the Court of Errors and Appeals in *Whalen v. Consolidated Traction Co.*, 61 N. J. Law, 608, 40 Atl. Rep. 645, 41 L. R. A. 836, 68 Am. St. Rep. 723, held 'that, by taking his stand upon the running board of the car, the plaintiff assumed the risk of such damages as were obviously incident to that position; still the company, by accepting him there as a passenger, owed to him the duty arising out of that relation.' To the same effect is *City Railway Co. v. Lee*, 50 N. J. Law, 435, 14 Atl. Rep. 883, 7 Am. St. Rep. 798. The acceptance of plaintiff as a passenger under the conditions affords the *ratio decidendi* in this, and other, jurisdictions," citing *West Chicago Street Ry. Co. v. McNulty*, 64 Ill. App. 549; *Wood v. Brooklyn City Ry. Co.*, 5 App. Div. (N. Y.) 492, 38 N. Y. Supp. 1077; *Abel v. Northampton Traction Co.*, 212 Pa. 329, 61 Atl. Rep. 915; *Seller v. Market St. Ry. Co.*, 139 Cal. 268, 72 Pac. Rep. 1006; *Elliot v. Newport St. Ry. Co.*, 18 R. I. 707, 28 Atl. Rep. 338, 31 Atl. Rep. 694, 23 L. R. A. 208; *Geltz v. Milwaukee Ry. Co.*, 72 Wis. 307, 39 N. W. Rep. 866.

The court then says: "And so in the case at bar, it would seem to be a rational deduction or corollary, from the rule that a common carrier is required to exercise due care to anticipate danger, and to employ care to avert it, that the acceptance by it of a passenger upon a crowded car presents a condition requiring it to exercise due care, under conditions and over an environment due to its own creation; and whether such care was exercised, and whether the passenger was chargeable with contributory negligence, in view of the conditions, necessarily become questions for the jury."

See also *Scott v. Bergen Co. Traction Co.*, 63 N. J. Law, 43 Atl. Rep. 1060, holding it not negligence per se for passengers to ride upon platform of electric street car, or to go there while awaiting opportunity to alight; *Babcock v. Los Angeles Traction Co.*, 128 Cal. 178, 60 Pac. Rep. 780, sustaining recovery by passenger injured by lurch of car after he started to leave, without waiting for it to come to full stop.

TRUST BURSTING UNDER THE COMMON LAW.

The meeting of the attorneys general of the various states of the Union, held at St. Louis recently, and which by the way is to be an annual affair, is destined to accomplish great and much needed reform in legislation; not only so, but the opportunity which these conventions give to the heads of the legal departments of the states for consultation and to adopt means and measures for the more successful carrying out of the laws we have, will be of great advantage to the country at large.

One of the objects to be subserved is to make the laws of each state more uniform with the laws of the others, to suggest needed legislation, the idea being by an exchange of views to promote uniformity, especially in matters of divorce, extradition and kindred subjects in which all the states are interested; and possibly, most important of all, they discuss means and ways and exchange ideas and come to conclusions as to the best manner of enforcing state legislation against trusts and monopolies of all kinds, where there are statutes enacted prohibiting such trusts.

At the recent convention held in St. Louis, on the 30th of September to 1st of October, the matter was emphasized by the members that some of our states have no statutes upon the subject, and the matter was discussed, past history related and precedents cited by which it became apparent to the attorneys general present that the common law provided a remedy in such instances often more efficacious than carelessly and inartificially drawn statutes, by which, oftentimes the power of the courts are hampered and restricted.

At this meeting a secretary was appointed and the members of the convention were requested to advise by letter of any new legislation enacted and premeditated, and also of any suits or proceedings instituted by any of them which in their judgment might be of interest to the legal representatives of the other states. It was made the duty of said secretary to keep a record of such communications as he might receive, indexed for easy reference and each attorney general was notified that whenever he might have a matter of public interest and importance under consideration that if he would communicate with the secretary, he would receive from him the consensus of opinion contained in any and all letters on the matter which may have been furnished him by the various attorneys general throughout the Union.

We will remark here, parenthetically, that the attorney general from the state of Texas, the oldest and most experienced of the delegates, stated, in open debate that the members would also have the advantage of the counsel and advice of the various assistant attorneys general throughout the Union, "Which," he said, "is a more important matter, as we all recognize that they do all the work."

Colorado has no constitutional or statutory provisions prohibiting trusts or monopolies; and yet there has been for years past in that state a conspiracy and combination between certain parties to fix and maintain the prices on various food products and commodities, the necessities.

of life, regardless of the law of supply and demand; it has increased in numbers and in power, gradually, methodically and surely until now there are some 200 articles of food, of prime necessity to the people of the state which can only be sold to the consumers at a price fixed by this combination; in fact, the retail dealers can not buy the ordinary staples necessary for the sustenance of the people except they first agree to sell these articles at a price fixed by this combine. The result, of course, is to annihilate competition and to force the people of the state to pay the price thus arbitrarily fixed.

This combination has existed for years, increasing and becoming more arbitrary year by year, and yet because of the lack of any statute on the subject, mainly, and partly because of indifference on behalf of the prosecuting officers, together with some uncertainty as to whether it was the duty of the attorney general or of the district attorney to prosecute, the trust has been allowed to grow and swell and fatten on the people until now.

The present attorney general who attended the St. Louis convention, (who is a western man and accustomed to "bust" bronchos and down and tie and braid cattle on the plains with the aid of a lariat), resolved to "bust" this trust if it could be done under the common law. In furtherance of his resolve he has recently prepared and filed a complaint and has prosecuted the same successfully, to the point of obtaining a temporary injunction.

This is destined to be a *cause celebre*, and for that reason, because of the great interest in the result not only to lawyers but to all the people, it will be commented upon somewhat in detail.

The complaint is brought on the relation of the attorney general for the people of the state of Colorado and he makes defendants, The Denver Jobbers' Association, The Retail Merchants' Association, The Denver Retail Grocers' Association, all corporations; also some half dozen of the largest grocery wholesalers in Denver, corpora-

tions, are made defendants, the Denver Local No. 1, a voluntary organization and some 14 individuals being members of the standing committees of these associations and representatives and agents of the sugar manufactories, who, prior to the commencement of this suit voluntarily dissolved their corporate existence.

The complaint alleges that, the defendant, Denver Local No. 1, is a branch of the Retail Merchants' Association of Colorado and that beside this branch there are sixty-seven other locals numbered from 2 to 67 inclusive and situated in different parts of the state and under the control, direction and management of this association.

It is further alleged that all of said defendants are engaged in the dealing in and selling of food products, sugar, coffee, breadstuffs and other articles of prime necessity indispensable to the sustenance of life:

That their business is not a private one but one in which all the people of the state are vitally interested:

That all contracts and agreements which they make between themselves or with others by which they regulate or fix the price of these articles and all agreements which have a tendency to enhance the prices of these articles destroy competition are in restraint of trade, against public policy and void:

That said defendants and all of them long prior to the 1st day of January last entered into contracts, agreements and combinations between themselves and with others unknown to plaintiff and with the various members of the defendant, the Denver Local No. 1, and with divers and sundry people throughout the state members of the allied voluntary associations mentioned herein, numbered from 2 to 67 inclusive, by which they regulated, fixed and controlled the prices of the articles mentioned to the consumers throughout the state:

That by agreement and concerted action between these defendants and all of them

the following procedure was adopted to-wit:

That the defendant, The Retail Merchants' Association of Colorado, acting as the agent and representative of all these defendants and of all or nearly all the wholesalers and jobbers in the state would send out printed cards or notices to the retail dealers in and throughout the state, by which they would request said retailers to maintain prices on certain mentioned articles at the ——— figure until further notice. That then through their agents, employees and standing committees they would keep a watch over the dealings of said retailers and if any of them dared to deviate from the prices so fixed, the matter was reported to said association and through them to the various wholesalers and jobbers and when next the retailer sent in an order for goods, he received instead of the goods a letter in substance as follows, to-wit:

"Dear Sir: We very much regret that we will be unable to fill your order of ——— date. When differences now existing between yourselves and The Merchants' Association are adjusted, we will be very glad to resume business with you. Trusting same will be amicably adjusted in the near future, we beg to remain, Yours very truly, ———."

The complaint was full and complete, going into the doings of the defendants with much detail, but the foregoing is a fair sample of its contents.

The prayer was for an order and decree declaring all such agreements, contracts and conspiracies to be in restraint of trade, as tending to destroy competition, against public policy, unlawful and void; and for an order restraining said defendants and each of them from further advancing or in anyway fixing or attempting to fix the price of said commodities by such combinations or agreements or at all during the pendency of this suit:

For a temporary restraining order, and asking that on final hearing the order might be perpetual; and for such other re-

lief as might be necessary to effectuate the object sought in this proceeding in order that the consumers might purchase the commodities essential to the support of life throughout the state in a fair, open and competitive market.

The matter came on to be heard before the court on the motion for a temporary injunction which was supported by various affidavits the contents of which may be briefly summarized as follows:

One, a prominent Denver retailer in coffee, spices, sugars, etc., made affidavit that he had never been a member of any of the defendant associations; that he had a store in the City of Denver and one in an interior town in the state; that he had frequently received notices from the defendant, the Retail Merchants' Association of Colorado, to maintain a certain price on the commodities in which he was dealing; that he refused and afterwards ordered goods from four of the wholesale jobbers and dealers, defendants herein, and that they refused to sell him goods of any description, at any price, because of his failure and refusal to maintain the prices so fixed; that one of these told him that he was compelled to adopt this rule for self-protection, that if he sold him any goods, after his refusal to maintain prices that the sugar manufactories would not sell him any sugar with which to supply his customers; that said associations control almost the entire product of food stuffs in the state; that over 75 per cent of the same were sold at such prices and only at such prices as were fixed by this combination:

That said associations adopted the same policy and proceeding with him in relation to his store in the country and ruined and broke him up in business by refusing to allow him to purchase any goods and caused him a loss of \$2,000:

That one of the defendants herein, the then secretary of one of the standing committees of the defendant association herein, told him that the retailers throughout the state did not possess intelligence

enough to conduct their business; that they would cut prices without reason and in consequence many of them would fail and go out of business and be unable to pay their bills to the jobbers and wholesalers and hence it was necessary for them to establish, fix and maintain the prices. There were many affidavits to the same purport presented to the court.

The defendants, represented by nearly a dozen different attorneys, demurred to the complaint on the ground that the same did not contain facts sufficient to constitute a cause of action; that the court had no jurisdiction; that the attorney general had no authority to bring the suit; that no threatened or actual injury was shown, and lastly, that it was an attempt to abridge the constitutional rights of defendants by prohibiting them from selling their own goods to whom they pleased and at what prices they pleased.

The matter was argued at length and thoroughly consuming three days, and hundreds of authorities cited and read to the court.

The attorney general relied on cases holding:

"The common law forbids the organization of such combinations, composed of numerous corporations and firms. They are dangerous to the peace and good order of society, and they arrogate to themselves the exercise of powers destructive of the right of free competition in the markets of the country, and, by their aggregate power and influence, imperil the free and pure administration of justice:

"That the common law will not permit individuals to oblige themselves by a contract either to do or not to do a particular thing, when the thing to be done, or omitted, is in any degree clearly injurious to the public."

The court was referred to cases holding: "Conspiracies which involve mischief to the public are indictable, although neither the object sought to be accomplished nor the means used for its accomplishment, is

criminal;" to New York where the court held, without considering the conspiracy statutes, that: "The agreement was void at common law, as contravening public policy, and injurious to the interests of the state;" to Pennsylvania cases holding: "That such combinations were not only illegal at common law, but a criminal offense;" to Ohio cases where the courts hold such agreements void, though there was no evidence that prices were unreasonably advanced, saying: "It is enough to know that the inevitable tendency of such contracts is injurious to the public."¹

The authorities do not deny, and the Attorney General did not dispute the right of private parties to contract and combine as freely and fully as they may desire, with the object of advancing their own interests, as a rule; but when they come to deal with the necessities of life—with food products, with coal and other articles of prime necessity and indispensable to the community,—any contracts affecting them affect the public good; and even private parties who combine to unreasonably raise the price of such commodities, are guilty of a violation of the common law, and are liable to criminal prosecution as well.

The court, the Hon. George W. Allen presiding, brushed aside the technical objections made by the demurrer, holding that where all the people were interested as here the attorney general was the proper party to bring the suit, that the court had jurisdiction, and it was his duty to determine the matter; that the evidence introduced established the unlawful combination; that by reason of the acts of the defendants the prices of the necessities of

(1) Citing the following decisions and very many others from all the highest courts establishing the doctrines announced. *The American Biscuit Co. v. Klotz*, 44 Fed. Rep. 721; *Alger v. Thacher*, 19 Pick. 51-54; *National Harrow Co. v. Quick*, 67 Fed. Rep. 130; *People v. North River Sugar Refining Co.*, 5, L. R. A. 386; *W. Va. Trans. Co. v. O. River Pipe Line*, 22 W. Va. 600; *Gibbs v. Smith*, 115 Mass. 592; *Craft v. McConoughhy*, 79 Ill. 346; *Com. v. Ward*, 1 Mass. 473; *State v. Burnham*, 15 N. H. 396; *Stanton v. Allen*, 5 Denio, 434; *Morris Run Coal Co. v. Barclay Coal Co.*, 68 Pa. St. 186; *People v. Sheldon*, cited in 27, L. R. A. 221.

life had been enhanced, and, moreover, that it was not necessary that actual or threatened injury be shown; that it was sufficient under the authorities that the natural and inevitable tendency of such contracts and agreements was to increase prices, and that was sufficient.

Judge Allen is a man of mature years, of large experience on the bench, and has always been bitterly opposed to the doctrine of "government by injunction," and yet the evidence in this case was such, and the subject matter involved of such transcendent importance to the people of the state, and to all thereof, that he granted the temporary injunction as prayed in an able opinion from which we quote largely herein, and which opinion, in the language of a qualified critic, "Will go down in the judicial records of Colorado as a powerful blow to wrong doers, and will also attract the attention of political economists, and those who strive conscientiously in all parts of the country to solve the greatest menace of the American people—the trust."

It would be interesting and improving to trusts, as well as to trust busters throughout the country, to insert his opinion in full, if space permitted, as it is we can only briefly refer to it. He said in part:

"I think it is not extravagant to say that it is the doctrine announced by all respectable courts, that the law of supply and demand should regulate prices, and especially when the necessities of life are concerned."

He then quoted from a leading case in which Justice Marshall said: "Competition is the life of trade. Pools, trusts and conspiracies to fix, or maintain the prices of the necessities of life, strike at the foundation of government; instill a destructive poison into the life of the body politic; wither the energies of competitors, blight individual investments in legitimate business; drive small and honest dealers out of business for themselves, and make them mere 'hewers of wood and drawers

of water,' for the trust; raise the cost of living and lower the price of wages; take from the average American freeman the ability to supply his family with necessary, adequate and wholesome food; force the boys away from school, and into the various branches of trade and labor, and the girls into workshops and other avenues of business, and make them bread winners while yet they are almost infants, because the head of the house cannot earn enough to feed and clothe his family."

The opinion continuing, says: "Why not some such wholesome announcements for the people of Colorado? If it is a new case, and we are not guided and directed by any previous opinions on these subjects, all the more is the court of equity and the *court of conscience* left free and untrammelled, and *under the common law*, at liberty to receive the facts and circumstances as they appear in evidence, and with an unrestrained liberty of conscience, make such rulings as will appear to do justice, concerning the questions presented in this case, not forgetting, that as the complaint is presented on behalf of the people of this state, it is presented for their relief."

The learned judge says further: "It appears from the evidence in this case that prices are named, fixed and maintained in numbers, as stated by defendant's counsel, on at least 200 articles classified as necessities of life; that such prices are fixed without regard to the law of supply and demand, without regard to the cost of production or manufacture, and without regard to the cost of exposing such articles to sale. Such combination, with such purposes, or doing business in a manner as to bring about such results and such consequences, the law uniformly prohibits, because it is declared to be unlawful."

Speaking to the grocers, he says: "Grocerymen may think they might desire to go on and transact business in this way"—"that when a manufacturer comes to town and says: 'We will sell you our goods at such a price, but you must sell them at a

certain price,' and the groceryman agrees to that." "They may think this is legitimate. They may think it in good morals and in good sense, is the way to do business, but I do not believe it, and if they have not the moral courage to change their method of doing business, I think the court would be doing them a great service in helping to break it up. I am sure it is not in the interest of the public, and I am sure it is unlawful." "Don't you know that when these combinations and trusts of the country got to producing all these various articles—meat, beef and other necessities of life, they were wise enough to see that they must have some method and manner of distributing them? And don't you know that they sent agents into every community in the country and into Denver and got the grocery men together and organized these combinations in order that they could get prices fixed on the commodities which they manufactured and sent out for sale? Don't you know that it appears from the testimony in this case, if we use our common sense, that they are all interested?" "It appears from the evidence that the manufacturers go to the jobbers, and the jobbers go to the groceryman, and the jobbers tell the groceryman what the manufacturers say they should sell the commodities at, and the jobbers say to the groceryman: 'You can have this commodity at a certain price, but must sell it at a certain price.' This is done for the purpose of protecting the manufacturer is the evidence in this case."

We will make one more quotation from this opinion, and to it we wish to call the attention of every community, and to the attention of every prosecuting officer in the land, for these evils prevail almost universally: "To be sure, the results of the disturbance or breaking up of this method of doing business in the City of Denver cannot reorganize or regulate the whole country, *but if every community would establish such rules and do business on such planes and on such bases, the question would finally be disposed of.*"

The thief who robs us on the highway, or steals into our homes while we sleep to appropriate to himself our earnings, runs his risk of punishment if caught, though commanding a certain respect for his courage.

A short time since two men who held a citizen up and went through his pockets, were convicted of the crime and sent to the penitentiary for five years, though their booty was only three copper cents. But much worse, because more insidious, are the ways of the giant combine who, by methods of indirection, and hitherto without risk to itself, becomes possessed of the necessarily small surplus of the wages of the masses, by piling up the prices upon the foods without which people cannot live, and obtained with difficulty even when their cost was within bounds. They have made what was hard before, impossible quite by their iniquitous exactions and control of the markets to their own advantage.

Men who once fought bravely the battle of life, now are prostrate before the desperate problem of living at all. Like the fabled vampire, this trust which the attorney general is trying to destroy, has spread its baleful wings over our city and state, and is sucking the heart's blood of men in the business world, and those who depend on them for bread and meat and coal, until their courage is well nigh spent in the struggle of trying to live. How to throttle this iniquitous combine which, like an octopus, has its grasp on the business situation, is not the problem of our state only, but of the whole nation.

At the next general convention of the attorneys general it will be the burning question for discussion. How to annihilate this monster evil which has well nigh done to death the enterprise of our country, by draining its wealth, to almost the last drop for its own enrichment, claims all our wisdom and acumen.

Men cannot work unless justice is on their side, to give them the reward of their labor. If every hard-earned dollar must

be spent for bread, whence is the stimulus to come for effort, once found in the thought of the little savings for the rainy day that comes to all of us some time?

Let the law, strong as a giant to run his course, fight the great fight for the people, high and low, rich and poor, which if won guarantees to a man the rewards of his efforts for himself and those dear to him. May the day come when the unrighteous trusts shall cease from the earth, discomfited and undone, and their slaves freed from their shackles shall rejoice in the work of their hands, with none to snatch its emoluments from them, save at the penalty prescribed for law breakers and in-
 rauders.

Fiat justitia, ruat coelum.

GEORGE D. TALBOT.

Denver, Colo.

P. S. Since writing, the temporary injunction granted herein was on final hearing made perpetual.

G. D. T.

PARDON—EFFECT OF BREACH OF CONDITION.

HENDERSON v. STATE OF FLORIDA.

Supreme Court of Florida, Division B. March 17, 1908.

Where a convict has accepted a conditional pardon and has been released from imprisonment by virtue thereof, but has violated or failed to perform the conditions or any of them, the pardon, in case of a condition precedent, does not take effect, and, in case of a condition subsequent, becomes void, and the convict may thereupon be rearrested and compelled to undergo the punishment imposed by his original sentence, or as much thereof as he had not suffered at the time of his release.

Where a conditional pardon of a convict stipulates that the pardoning board or the Governor, upon being made satisfied ex parte of a breach of its conditions, might declare it to be void and order the convict's rearrest and imprisonment on the original sentence, such stipulation, while valid and binding on the convict, if accepted by him, does not furnish the exclusive method of adjudging a breach of such pardon and its consequent annulment. Any court of competent jurisdiction, notwithstanding such stipulation, may likewise inquire into any alleged breach thereof, and may annul it if satisfied of such breach.

Taylor, J.: The plaintiff in error, as defendant below, was informed against in the criminal court of record of Duval county for

the crime of larceny; the information also alleging a former conviction of the same crime in the same court. At the trial the following verdict was returned by the jury: "We the jury, find the defendant guilty of 2nd larceny." Upon this verdict the defendant was sentenced to imprisonment in the state prison for 10 years, and for a review of this judgment brings his case here by writ of error.

The only error urged and argued here is that the court below erred in not granting the defendant's motion for new trial and motion in arrest of judgment, made upon the ground that the defendant had been absolved from the former conviction of larceny by a conditional pardon granted to him prior to the last trial and conviction by the pardoning board of the state. The fact that there had been such a conditional pardon was not made known at the trial before verdict, but was advanced for the first time in a motion for new trial, and also in a motion in arrest of judgment. In so far as the motion in arrest of judgment is concerned, such fact of pardon could not properly be made a ground thereof, since it was not a matter of record in the cause, but was new matter dehors the record, brought forward for the first time after verdict. Motions in arrest of judgment can be predicated only upon matters of record in the cause, and reach only infirmities in such record. Neither did such fact of a conditional pardon from the former conviction necessitate or warrant the grant of a new trial under the circumstances of this case. If the conditional pardon granted did in fact wholly absolve the defendant from the former conviction, so that it could not be accounted against him as a first or former conviction upon a second trial and conviction for the same crime, then such pardon constituted a defense in mitigation of the penalty at the trial for the new or second offense that should have been proven at the trial to have availed the defendant, and it was too late to bring it forward after the verdict in a motion for new trial. Especially is this true when the information upon which he was being tried alleged such former conviction and that the crime it charged was a second offense. But, again, even if such conditional pardon was a proper matter to be urged for the first time in a motion for new trial, it cannot avail the defendant here. By an examination of the conditional pardon introduced on the motion for new trial we find that it was granted to the defendant upon the expressed condition that he should thereafter, during the term of his natural life, lead a sober, peaceable and law abiding life.

In the case of *Alvarez v. State*, 50 Fla. 24, 39 So. Rep. 481, 111 Am. St. Rep. 102, it was held that where a prisoner has accepted a conditional pardon, and has been released from imprisonment by virtue thereof, but has vio-

lated or failed to perform the conditions, or any of them, the pardon, in case of a condition precedent, does not take effect, and, in case of a condition subsequent, becomes void, and the criminal may thereupon be rearrested and compelled to undergo the punishment imposed by his original sentence, or as much thereof as he had not suffered at the time of his release.

By the conviction herein it was established in the most conclusive way, viz., by the formal judgment of a court of competent jurisdiction, that the defendant had violated the conditions of said pardon, subsequently to the grant thereof, by again committing the same offense from which such pardon conditionally absolved him, and that consequently such pardon was wholly null and void. It will hardly be seriously contended that a man who commits larceny of the goods of his fellow man leads a law-abiding life. It is further contended that, because said conditional pardon stipulates that the pardoning board or Governor, upon being made satisfied ex parte of a breach of its conditions by the defendant, might declare it to be void and order his rearrest and imprisonment on the original sentence, it remains in full force and effect until the pardoning board or Governor declare it void for a breach thereof, which action they had not taken. There is no merit in this contention. While such stipulations in conditional pardons are valid, and, if accepted by the convict, are binding on him, yet they do not furnish the exclusive method of adjudging a breach of such pardon or of its annulment. Any court of competent jurisdiction may likewise inquire into any alleged breach thereof, and may annul it if satisfied of such breach, notwithstanding such stipulation therein enabling the pardoning board or Governor so to do. *Alvarez v. State*, supra.

It is further contended that no legal judgment can be imposed upon the verdict rendered. There is no merit in this contention. Our construction of the verdict, herein quoted, is that the jury found the defendant guilty of the crime of larceny of which he was charged in the information on which he was tried, and that it affirmatively found the further fact that such conviction was a second conviction of the same defendant of the same crime. Thus viewed, the sentence predicated thereon was proper.

This disposes of all the questions presented and argued; and, finding no error, the judgment of the court below in said cause is hereby affirmed, at the cost of Duval county—the defendant having been adjudged to be insolvent.

HOCKER and PARKHILL, JJ., concur.

SHACKLEFORD, C. J., and COCKRELL and WHITFIELD, JJ., concur in the opinion.

Note—Procedure for Recommitment on Breach of Condition in a Conditional Pardon.—We use the decision in the principal case to raise for discussion the question there hinted at, as to whether the governor or other executive board or official, having authority to issue pardons, is the sole judge of whether there has been a breach of a condition imposed upon a prisoner where he has accepted a pardon for an offense for which he has been convicted. Rather, on the other hand, is it not the better practice and the rule at common law that no recommitment should be made in such cases except upon a rule to show cause and after a fair hearing?

Much of the confusion of thought surrounding this question is due to the fact that there is too often a failure to distinguish between a parole and a conditional pardon. Under a parole, a prisoner is still a prisoner out of confinement. He is still under the legal disabilities imposed by his sentence; he is still under prison rules and regulations and his freedom exists wholly at the pleasure of the governor. Under a conditional pardon, however, the executive, where the condition is subsequent at least, grants to the prisoner not only his liberty but complete exemption from the sentence imposed upon him, and absolves him from all the effects of his conviction. His disabilities, imposed by his conviction are all removed.

The condition subsequent, upon breach of which the conditional pardon becomes invalidated, should be proven to exist and for this purpose the defendant ought to have his day in court. This was the rule at common law. See *State v. Wolfer*, 53 Minn. 135, 54 N. W. Rep. 1065, and cases cited. Of course, the statute may provide a different course of procedure, but we believe our observations as to the distinction existing between the procedure to be followed under breaches of paroles and conditional pardons is founded upon principle and sound reason.

Thus in the case of *Woodward v. Murdock*, 124 Ind. 439, 24 N. E. Rep. 1047, which is often cited as authority for the proposition that the governor is the sole judge of the effect of the breach of a conditional pardon, the facts show that it was a mere parole and not a conditional pardon which was granted. The court in that case asks the question, speaking of the act of clemency by which the prisoner received his liberty, said: "Was it, in contemplation of law, an unconditional pardon, or what it purported to be and was intended to be, a mere parole? And if but a parole, was the appellant subject to re-imprisonment at the will of the governor without a hearing before some judicial tribunal?" The court in answering the last question in the affirmative, said: "Having unlimited power, the governor may grant paroles, conditional pardons and unconditional pardons. . . . The appellant, as well as the governor, recognized the act of the latter as but the

granting of a parole. . . . Under such circumstances, the appellant was at large *merely* at the will of the governor. The governor had it in his power to order the appellant to prison at any time."

As to the exact method of procedure to be observed in recommitting a prisoner who has broken the terms of his conditional pardon the courts are in some confusion. In Michigan the courts hold that a person charged with violating the conditions of his pardon must be regularly examined, informed against and tried, like any other person charged with crime. *People v. Moore*, 62 Mich. 497. In New York and Pennsylvania, the courts hold that where a prisoner has been conditionally pardoned and the condition is broken, the proper practice for remanding him to jail is by rule to show cause why he should not be recommitted. *People v. Burns*, 77 Hun 92, (affirmed, 143 N. Y. 665, 39 N. E. Rep. 21); *Commonwealth v. Haggerty*, (Pa. 1869), 4 Brewst. 326. On the other hand, in South Carolina it is held that in such a case, a person charged with the breach of a conditional pardon is to be brought before the court to have his former sentence reiterated, and another day assigned for its infliction. On such a proceeding the prisoner may show cause why it should not be passed; but he is not entitled to a trial by indictment, or on a written rule to show cause. *State v. Chancellor* (S. Car. 1847), 1 Strobl. 347, 47 Am. Dec. 557.

As a pardon is an act of executive clemency, it is probably within the power of the executive (*Arthur v. Craig*, 48 Iowa 264), or of the legislature (*In re Kennedy*, 135 Mass. 48), to provide expressly that in the event the condition imposed by the pardon is broken, the governor shall have the right to re-arrest and re-imprison the person so pardoned on his own authority without judicial interposition and that he shall be the sole judge of whether the condition in the pardon has or has not been violated. Where, however, there is no such statutory regulation or provision in the pardon itself, the rule at common law, and we might add, the only just and sensible rule is that such a person charged with a breach of a conditional pardon, cannot, on the mere order of the governor, be arrested and remanded to suffer his original punishment, but he is entitled to a hearing before the court in which he was convicted, or some superior court of criminal jurisdiction, and an opportunity to show that he has performed the condition of his pardon, or that he has a legal excuse for not having done so. *State v. Wolfer*, 53 Minn. 135, 54 N. W. Rep. 1065. Such a rule makes for justice. It permits the court, if it sees fit and the circumstances warrant the action, to extend the time for the performance of the condition. *People v. James*, (N. Y.), 2 Caines, 57.

Following closely the distinction between a parole and a conditional pardon, we believe it to be bad practice for the governor or the legislature to

provide that the governor shall be the sole judge of the breach of a conditional pardon. If the governor desire to keep such a tight hold on a convict whom he desires to set at liberty, let him do so by parole. This does not raise new hopes in the breast of the convict nor does it free him from all the disabilities of his conviction. Where, however, a governor grants a pardon and thus exempts a convict from all the penalties of his conviction and sends him into society a free man, with the mark of guilt removed, and then tacks on to such pardon a condition subsequent which, if broken, invalidates the pardon, it is not in keeping with justice nor with a wise public policy, to permit the executive to be the sole judge of the breach of such conditional pardons and thus be capable of wielding to his own advantage, if he desires, such a tremendous influence over a large class of free men having now all the powers of citizenship and suffrage, but who were once criminals and conditionally pardoned. The old common law rule which required a hearing on a rule to show cause before a prisoner, released on a conditional pardon, could be recommitted because of violation of the condition, most clearly comports with reason and justice and a sound public policy.

ALEXANDER H. ROBBINS.

JETSAM AND FLOTSAM.

ATTORNEY GENERAL HADLEY ATTACKS THE STANDARD OIL REBATE DECISION.

The feature of the opening session of the second annual meeting of the National Organization of attorney generals was the address of President Herbert S. Hadley of Missouri, who, in reviewing the decision of Judge Grosscup reversing the \$29,000,000 fine of the Standard Oil Company, declared the judge was "either blinded by prejudice or has an unfortunate disposition to obscure the merits of a controversy by strained and irrelevant technicalities." On this subject President Hadley said:

"An event of particular interest to the members of this association, as well as the entire country, was the reversal by the United States Circuit Court of Appeals of the \$20,000,000 fine which was assessed against the Standard Oil Company of Indiana by Judge Landis of the United States District Court. While this case does not involve questions particularly within the duties of the attorney generals of the different states, yet the questions passed upon in the decision of the United States Circuit Court of Appeals are of interest to all lawyers, and particularly to those engaged in public prosecutions.

While the members of our association and of our profession might not be willing to agree with President Roosevelt in his statement that the decision would have been different if the defendant had not been rich and influential, yet it is a conservative statement to say that the reasoning of the Court of Appeals has failed to receive the approval of the members of our profession throughout the

country. One of the grounds upon which the judgment was reversed was that the trial court erred in considering, in the fixing of the amount of the fine, the fact that the Standard Oil Company of Indiana, a \$1,000,000 corporation, was owned and controlled by the Standard Oil Company of New Jersey, a \$100,000,000 corporation, whose property, at a conservative estimate was worth at least \$500,000,000 of dollars.

To deny that in a criminal case a judge can and should, in fixing the amount of the fine, consider the financial condition of the defendant, is to deny the correctness of a rule of law as old as our jurisprudence and our courts. And to assert that men may, by the organization of a puppet corporation, escape the proper measure of punishment for their wrongdoing, is to give to the legal fiction of the corporation, greater rights, privileges and immunities than those which belong to natural persons.

The judge who could not see the Standard Oil Company of New Jersey in the Standard Oil Company of Indiana, and who could not see through both of these legal fictions to the real owners and the real offenders, John D. Rockefeller, H. H. Rogers, John D. Archbold and others, is either blinded by prejudice or an unfortunate disposition to obscure the merits of a controversy by strained and irrelevant technicalities."

Commenting further on the Standard Oil decision, President Hadley said:

"The two points upon which the judgment was reversed, seem so manifestly untenable as to furnish a striking illustration of the tendency of some of the appellate courts to search for technicalities and strained arguments upon which to reverse convictions in criminal cases. This case should serve as an impressive argument as to the necessity of the national and state governments enacting a law to the effect that no judgment in a criminal or civil case should be reversed unless the court could affirmatively say upon the entire record, that the judgment was for the wrong party, and that but for the error complained of a different judgment would have been rendered."

BOOK REVIEWS.

AMERICAN STATE REPORTS, VOL. 119.

No series of reports keep up such a uniform excellence in its annotations as the one we have for review at this time. And it cannot be gainsaid that the main value of any series of reports is not in the reports themselves but in the high character and exhaustiveness of its monographic notes. In the present volume of the American State Reports there are a large number of splendid monographs of which we call attention to the following: Defenses to Notes and Other Obligations Given for Gambling Debts, p. 172; Right of Employee to Recover for Injury Sustained by Reason of Defect in Machinery, of Which he had Notice, When Injury Resulted from Master's Failure to Perform Promise to Repair; Who Is Entitled to Appeal as a Party Interested Or Injured; and When Is An Attorney's Contract

of Employment Void As Against Public Policy Because Secured by Solicitation.

Printed in one volume and published by Bancroft-Whitney Company, San Francisco, Cal.

HUMOR OF THE LAW.

"If you were a—jury, Clara," said the embarrassed young lawyer hesitatingly, "I could plead my cause with more self-possession. But in Cupid's courts I don't think I can claim to be a first class advocate."

"Perhaps you have not had an extensive practice, William," suggested the maiden, softly.

"That's it exactly, Clara," eagerly rejoined the young man, moving his chair a little nearer. "I'm a new hand at this business. But if I felt sure the jury—"

"Meaning me?"

"Yes—wasn't prejudiced against the counsel—"

"What kind of jury are you considering me, William?" she asked, with down-cast eyes.

"A common jury, of course. You couldn't be a grand jury, you know."

"Why not?"

"Because I don't plead before grand juries."

"I think, William," said the blushing maiden, "I would rather, for this occasion, be considered a grand jury, if you don't mind."

"Why, dear?"

"Because"—and she hid her face somewhere in the vicinity of his coat collar—"because I have found a true Bill!"—London Answers.

Admiring Friend: I see that you are now practicing law.

Frank Fledgling: No sir, I appear to be practicing law, but I am really practicing economy.

WEEKLY DIGEST.

Weekly Digest of ALL Current Opinions of ALL the State and Territorial Courts of Last Resort, and of all the Federal Courts.

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1. **Accord and Satisfaction—Part Payment.**—Acceptance by a creditor on a liquidated demand of less than the entire amount will not constitute a defense to a suit for the balance, unless paid as a compromise of the demand, the validity of which is disputed in good faith. —*Jackson v. Security Mut. Life Ins. Co., Ill., 84 N. E. Rep. 198.*
2. **Account, Action On—Evidence.**—A witness testifying by interrogatories to the correctness of an account may, after showing that he has personal knowledge of the correctness of each item, attach a copy of the account as an exhibit. —*Arnold v. Adams, Ga., 60 S. E. Rep. 815.*
3. **Account Stated—Statute of Frauds.**—In an action on an account stated, a defense that the promise to pay the stated account was violative of the statute of frauds because not in writing may be properly interposed, since it presents the question of the legality of the promise. —*State Life Ins. Co. v. Postal, Ind., 84 N. E. Rep. 156.*
4. **Acknowledgment—Certificate.**—Where a certificate of acknowledgment of a commissioner of deeds for North Carolina, residing in another state, recites, "given under my hand and seal," the presumption is that the seal was affixed to the original. —*Johnson v. Eversole Lumber Co., N. C., 60 S. E. Rep. 1129.*
5. **Defective Construction.**—A liberal construction should be applied to sustain the proof of the execution of a deed or other instrument required to be proved for record. —*International Kaolin Co. v. Vause, Fla., 46 So. Rep. 3.*
6. **Adoption—Equitable Right of Parent to Interfere.**—A father unable to provide for his infant child may transfer the custody and right to the services to another, subject to the right of an equity to interfere in the interest of the child. —*Middleworth v. Ordway, N. Y., 84 N. E. Rep. 291.*
7. **Adverse Possession—Hostile Character of Possession.**—A person possessing the land of another through a mistake as to the boundaries of his land with no intention to claim as his own that which does not belong to him held not to hold adversely to the true owner. —*Schaubach v. Dilleuth, Va., 60 S. E. Rep. 745.*
8. **Animals—Agistment.**—The question as to whether an agister is negligent is for the jury, and they may consider the customs prevailing on the subject and the traits of the animals, and that the negligence of the owner may have contributed to the injury. —*Wilensky v. O. C. & H. E. Martin, Ga., 60 S. E. Rep. 1074.*
9. **Appeal and Error—Necessity of Objections.**—Where a party neglected to reserve any questions in respect to alleged errors of the court made during the trial, the errors must be regarded as waived. —*Egoff v. Board of Children's Guardians of Madison County, Ind., 84 N. E. Rep. 151.*
10. **Rescission of Contract.**—A decree rescinding a deed at the suit of the grantee based on the finding of the court on an issue of fact will be reversed if the contract as expressed in the deed gives the grantee all the grantor could reasonably have conveyed under the circumstances. —*Isner v. Nydegger, W. Va., 60 S. E. Rep. 793.*
11. **Appearance—Waiver of Irregularity.**—Persons who, upon being made parties by amendment of cross-bills in an equity case enter their appearance without objection, as representatives of a deceased party, cannot com-
- plain of the jurisdiction of the court over them because they were not brought in by bill of revivor. —*Sorg v. Crandall, Ill., 84 N. E. Rep. 181.*
12. **Associations—By-Laws.**—While the courts have no visitatorial power to determine whether the by-laws of a voluntary association are reasonable or unreasonable, they may determine whether they have been adopted by the rule agreed upon by the members of the association. —*Green v. Felton, Ind., 84 N. E. Rep. 166.*
13. **Attachment—Discharge of Lien.**—For failure to take out execution for 46 days after judgment, plaintiff held to have lost his lien upon real estate by force of an attachment and his right to recover in equity the surplus proceeds arising from a sale of such real estate on mortgage foreclosure. —*Webber v. Foxboro Co-operative Bank, Mass., 84 N. E. Rep. 303.*
14. **Grounds.**—Where plaintiffs had taken a mortgage to secure advances, and the value of the property mortgaged was about equal to their claim, an attachment will not be sustained, though defendant sought to dispose of his property. —*Arcadia Cotton Oil Mill & Manufacturing Co. v. Fisher, La., 46 So. Rep. 28.*
15. **Bankruptcy—Effect on Forthcoming Bond.**—Where personality has been levied on under a judgment obtained more than four months prior to a petition in bankruptcy, the subsequent adjudication of defendant in bankruptcy and the seizure by the bankruptcy court of the property levied on will not release the surety on a forthcoming bond. —*United States Fidelity & Guaranty Co. v. Murphy, Ga., 60 S. E. Rep. 831.*
16. **Banks and Banking—Action on Note.**—It is no defense to an action on a note by bank officers and stockholders to secure payment of an overdraft that the note was made for the accommodation of the bank and was fully paid when the bank acquired it. —*Traders' & Truckers' Bank v. Black, Va., 60 S. E. Rep. 743.*
17. **Benefit Societies—Right to Proceeds.**—Where money is paid into court by a mutual benefit society for the benefit of claimants, proceedings to determine the rights of claimants are governed by equitable principles, and the former wife of insured, divorced for her adultery, has no equity thereto as against his wife at the time of his death. —*Farra v. Braman, Ind., 84 N. E. Rep. 155.*
18. **Bills and Notes—Bona Fide Holders.**—The holder of a note indorsed in blank by the payee is presumed to be such bona fide and for value and is entitled to sue the maker. —*South & Lane v. People's Nat. Bank, Ga., 60 S. E. Rep. 1087.*
19. **Defenses.**—Payee of a non-negotiable note held to take the same unaffected by an agreement between an irregular indorser and the maker that the same should be delivered only if the maker secures other indorsers. —*Kidd v. Beckley, W. Va., 60 S. E. Rep. 1089.*
20. **Non Est Factum.**—Testimony of one whose name appears as the maker of a note that he signed it as surety with an understanding that another should sign as maker held not to support the plea of non est factum or constitute a defense as against a bona fide purchaser. —*Wilkes v. Pope, Ga., 60 S. E. Rep. 823.*
21. **Brokers—Adverse Interests.**—Rights of the administratrix of a pledgor of stock pledged to secure a note, also guaranteed, and surrendered to the guarantor's administrator on payment of the debt and sold by him to a broker retained by the administratrix to sell the

stock, stated.—*Hinckley v. Colvin*, Ill., 84 N. E. Rep. 174.

22.—**Commissions.**—Where one agrees to sell land for a certain sum "net" to him, a broker procuring a purchaser is entitled to no commission, unless the sum received exceeds the specified net price.—*Wolverton v. Tuttle*, Ore., 94 Pac. Rep. 961.

23.—**Carriers.**—Delivery of Freight in Damaged Condition.—Where a carrier delivers freight in a damaged condition, the presumption is that the damage occurred while in the carrier's possession.—*Huggins v. Atlantic Coast Line R. Co.*, S. C., 60 S. E. Rep. 694.

24.—**Liability of Connecting Carriers.**—Where a connecting carrier's liability was limited to a loss sustained on its own line, and no loss was there shown to have occurred, such carrier was not liable for a statutory penalty for failing to pay a claim for damages within 60 days.—*Moody v. Southern Ry. Co.*, S. C., 60 S. E. Rep. 711.

25.—**Who Are Passengers.**—One who gets on the train, mistaking it for that of another road and attempts to alight, but changes his mind, and decides to pay his fare, is not, while on the car steps, a passenger.—*DeVane v. Atlanta, B. & A. R. Co.*, Ga., 60 S. E. Rep. 1079.

26.—**Charities.**—Trustees.—Where testator has directed a person named in his will to carry out provisions thereof, the person so named will be held a trustee, and by implication to hold the legal title, if necessary to carry out the will.—*Kemmerer v. Kemmerer*, Ill., 84 N. E. Rep. 256.

27.—**Constitutional Law.**—Conflict of Jurisdiction.—No injunction should be awarded by a federal court against enforcement of state railroad rate law which it is alleged violates the federal constitution, unless it is reasonably free from doubt.—*Ex parte Young*, U. S. S. C., 28 Sup. Ct. Rep. 441.

28.—**Construction of Statute.**—A construction of a statute so as to involve the exercise of a doubtful power will not readily be adopted, in the absence of direct words, where the language used reasonably admits of another which will exclude the question of constitutional authority to enact the particular statute.—*Hickory Marble & Granite Co. v. Southern Ry. Co.*, N. C., 60 S. E. Rep. 719.

29.—**Contracts.**—Mutual Assent.—Mutual assent is assent to the same thing in the same sense and under a common understanding of the stipulations agreed to.—*Martin v. Thrower*, Ga., 60 S. E. Rep. 825.

30.—**Corporations.**—Foreign Corporations.—Where a foreign corporation rightfully acquired title to land within the state, when it had complied with the laws as to a foreign corporation, but failed to comply with the subsequent enactment, but no forfeiture of title had been judicially established, it could protect its title and right to possession as against a trespasser.—*War Eagle Consol. Min. Co. v. Dickie*, Idaho, 94 Pac. Rep. 1034.

31.—**Stockholders.**—To entitle a stockholder to sue to redress a corporate injury committed *infra vires* against a solvent corporation in the full exercise of its franchises, it must appear either that the directors are disabled by misconduct or have refused to sue on demand.—*Deveny v. Hart Coal Co.*, W. Va., 60 S. E. Rep. 780.

32.—**Voidable Contracts.**—The action of the

directors of a corporation fixing the salary of a president or director for personal services in the general management of the company's business is voidable as against any dissentient stockholder promptly applying for relief.—*Green v. Felton, Ind.*, 84 N. E. Rep. 166.

33.—**Courts.**—Appellate Jurisdiction.—An action held not one originating in the superior court, within the constitutional amendment conferring on the Supreme Court jurisdiction for the correction of errors from the superior courts in actions originating therein, and properly returnable to the Court of Appeals.—*Ford v. Harris*, Ga., 60 S. E. Rep. 835.

34.—**Jurisdiction.**—A person has the right to select such tribunal as he chooses for the prosecution of his rights, and the court which first obtains jurisdiction will retain it.—*Royal League v. Kavanagh*, Ill., 84 N. E. Rep. 178.

35.—**Criminal Trial.**—Burden of Proving Alibi.—A charge that the burden was on defendant to prove an alibi by a preponderance of the evidence was not erroneous because not stating that defendant was only required to prove the alibi to a reasonable certainty.—*Jones v. State*, Ga., 60 S. E. Rep. 840.

36.—**Commission of Offense by Innocent Agent.**—Where a person causes a crime to be committed through an innocent agent he is the principal, and an exception to the rules applicable to principals and accessories in the trial of criminal cases arises *ex necessitate legis*.—*State v. Bailey*, W. Va., 60 S. E. Rep. 785.

37.—**Instructions.**—In a prosecution for homicide, it is proper to instruct the jury that they are "not at liberty to disbelieve as jurors if from the evidence they believed as men"; that their oath imposed on them no obligation to doubt where no doubt would have existed if no oath had been administered.—*People v. Zajicek*, Ill., 84 N. E. Rep. 249.

38.—**Presence of Accused.**—Where a person indicted for felony, while at liberty on bond is voluntarily absent when the jury is brought into court at its request, and a portion of the evidence is read from the stenographer's notes, he will be deemed to have waived the right to be present.—*State v. Thurston*, Kan., 94 Pac. Rep. 1011.

39.—**Deeds.**—Undue Influence.—It must be shown that the grantor at the time of execution of a deed stood in *vinculis*, or that the undue influence destroyed free agency and substituted the will of another for that of the grantor.—*Ritz v. Ritz*, W. Va., 60 S. E. Rep. 1095.

40.—**Depositions.**—Certificate of Officer.—A certificate of an officer taking a deposition that the witnesses were examined before him at his office, and that the testimony was read over to the witnesses before they subscribed to same, held to show a substantial compliance with 23 St. at Large, p. 1072.—*John Slaughter Co. v. King Lumber Co.*, S. C., 60 S. E. Rep. 705.

41.—**Divorce.**—Appealable Orders.—An order allowing temporary support or alimony and counsel fees pending the litigation is appealable.—*Messervy v. Messervy*, S. C., 60 S. E. Rep. 692.

42.—**Easements.**—Streets.—Where a grantor filed with the register map of the land with proposed streets laid off thereon, a subsequent deed of a tract fronting on such proposed streets, while it did not convey the fee to the center of the street, conveyed an easement in

such proposed streets.—*Trowbridge v. Ehrlich*, N. Y., 84 N. E. Rep. 297.

43. **Elections—Contests.**—It will be presumed in favor of the validity of an election that the law had been complied with as to persons whose names did not appear on precinct books, where, conceding the entire number of ballots cast by them to be illegal, the result of the election would not be changed.—*State v. Jennings*, S. C., 60 S. E. Rep. 699.

44. **Electricity—Municipal Corporations.**—A municipality authorized to maintain a municipal lighting plant is not entitled to remove appliances erected by owners of a valid franchise, unless there has been a substantial violation of the franchise.—*Wakefield v. Village of Theresa*, 109 N. Y. Supp. 414.

45. **Eminent Domain—Expropriation Suit.**—The adjudicatee at a judicial sale made pending an expropriation suit has a standing to intervene, and the question whether he is in default in complying with his bid cannot be decided as an incident to the expropriation suit.—*Yazoo & M. V. R. Co. v. Clarke, La.*, 46 So. Rep. 17.

46. **Equity—Adequate Remedy at Law.**—The remedy at law of a railroad company to test the validity of a statute fixing rates for railroad transportation by disobeying the statute and submitting to criminal prosecution held not so adequate as to deprive equity of jurisdiction.—*Ex parte Young*, U. S. S. C., 28 Sup. Ct. Rep. 441.

47. **Mistake of Law.**—Ordinarily, a mistake of law, pure and simple, is not ground for relief, but the doctrine, *ignorantia juris non excusat* is confined to mistakes of the general rules of law and has no application to mistakes of persons as to their own private legal rights.—*Burton v. Haden*, Va., 60 S. E. Rep. 736.

48. **Estoppel—Infringement of Patent Rights.**—A seller of an appliance held estopped to deny that it infringed a certain patent in view of a judgment recovered against him for infringement of the patent by the use of the appliance, which he paid.—*National Metal Edge Box Co. v. Gotham*, 109 N. Y. Supp. 450.

49. **Tax Deeds.**—One who as between himself and another was under duty to pay the taxes on real estate, but who permitted the same to be sold for taxes and afterward acquired the tax title, cannot avail himself of the same or of the fact of sale, to defeat the title of such other.—*Anderson v. Messenger*, U. S. C. C. of App., Sixth Circuit, 158 Fed. Rep. 250.

50. **Evidence—Opinion Evidence.**—In an action against a carrier for damage to live stock during transportation, testimony of a witness consisting of facts within his knowledge, going to show the condition of one of the horses in question and its depreciation in value, was admissible.—*Huggins v. Atlantic Coast Line R. Co.*, S. C., 60 S. E. Rep. 694.

51. **Parol.**—Except where the statute of frauds prevents, parol evidence is admissible to show that a written agreement since its execution has been altered or abrogated by mutual consent.—*Sparks Imp. Co. v. Jones*, Ga., 60 S. E. Rep. 810.

52. **Factors—Misconduct.**—If a factor exceeds his powers and sells the property in an unwarranted manner, no cause of action flows to the principal unless some damage enures to him by the agent's misconduct.—*W. W. Gordon & Co. v. Cobb*, Ga., 60 S. E. Rep. 821.

53. **Federal Courts—Diverse Citizenship.**—Where federal jurisdiction rests on diversity of citizenship, it is no objection that citizens of different states other than the state in which the suit is instituted are combined as co-complainants.—*Schultz v. Highland Gold Mine Co.*, U. S. C. C., D. Ore., 158 Fed. Rep. 337.

54. **Injunction Against Statutory Transportation Rates.**—A federal court may enjoin the attorney general of the state from enforcing against persons affected a state statute which violates the federal Constitution; such proceeding not being an action against the state.—*Ex parte Young*, U. S. S. C., 28 Sup. Ct. Rep. 441.

55. **Fire Insurance—Mutual Companies.**—Insured in a mutual fire insurance company held not entitled to assail proceedings resulting in the levy of an assessment against him simply by charging that no process of the court ordering the assessment was served on him.—*Hammond v. Knox*, 109 N. Y. Supp. 367.

56. **Gifts—Mutual Benefit Insurance.**—Delivery by insured to his son of a pass book of a fraternal insurance association, in which receipts for payments of assessments must be entered, held not a delivery sufficient to consummate a gift of the policy.—*Ingersoll v. Pond*, Va., 60 S. E. Rep. 738.

57. **Guardian and Ward—Action by Ward.**—A guardian cannot maintain an original suit or intervene in a partition between heirs; such suit being properly maintainable only in the name of the ward by his next friend.—*McMullen v. Blecker*, W. Va., 60 S. E. Rep. 1093.

58. **Husband and Wife—Bankruptcy Exemptions.**—The common-law rule that property purchased with the earnings of a wife and children belonged to the husband held inapplicable in a proceeding to set aside exemptions to the husband in bankruptcy from other property.—*In re Diamond*, U. S. D. C., N. D. Ala., 158 Fed. Rep. 370.

59. **Separation Agreements.**—While an agreement between husband and wife to separate in consideration of a sum of money, is void as against public policy, an agreement relating to the property rights of parties made when the separation has already taken place is valid and enforceable.—*Moreland v. Moreland*, Va., 60 S. E. Rep. 730.

60. **Indictment and Information—Principals in First and Second Degree.**—Where two persons are charged with murder as principals in the first degree, if the evidence shows one of them to be guilty in the second degree, he can be convicted under the indictment.—*Jones v. State*, Ga., 60 S. E. Rep. 840.

61. **Infants—Service of Process.**—In partition a minor over 14, who has no guardian, may be served personally, but does not become a party before a guardian ad litem has been appointed, and the appointment accepted, as directed by Civ. Code 1895, Sec. 4987.—*Douglas v. Johnson*, Ga., 60 S. E. Rep. 1041.

62. **Injunction—Adequacy of Legal Remedy.**—A final judgment in a city court for defendant held as effectual to relieve him of the obligation to pay a note as would a decree of a court of equity cancelling the note.—*Norton v. Graham*, Ga., 60 S. E. Rep. 1049.

63. **Local Option Election.**—An injunction to restrain the police jury from promulgating the returns of a local option election cannot be maintained before the result of the election has been proclaimed.—*Town of Ponchatoula v.*

Police Jury of Parish of Tangipahoa, La., 46 So. Rep. 16.

64. **Insane Persons—Collateral Attack on Appointment of Committee.**—An order of the county court appointing a committee for a lunatic held not subject to collateral attack in ejectment by a subsequent committee to recover land sold by the former committee.—Howard v. Landsberg's Committee, Va., 60 S. E. Rep. 769.

65. **International Law—Charge of Sovereignty.**—The right to the emoluments incident to the hereditary office of high sheriff of Havana, left by the Spanish law in the hands of the incumbent until proceedings for the condemnation of the office being completed and the incumbent paid, did not survive extinction of sovereignty of Spain over Cuba.—O'Reilly De Camara v. Brooke, U. S. S. C. 28 Sup. Ct. Rep. 439.

66. **Interstate Commerce—State Regulation.**—Act May 13, 1903, 24 St. at Large, p. 1, making each carrier liable for freight lost, damaged, or destroyed by a connecting carrier, held an infringement on the interstate commerce clause of the federal constitution.—Winslow Bros. & Co. v. Atlantic Coast Line R. Co., S. C., 60 S. E. Rep. 709.

67. **Intoxicating Liquors—Moot Case.**—In a prosecution under a city ordinance for illegal sale of liquor, held inadmissible to attack the validity of the ordinance as applied to hypothetical cases not raised by the record.—City of Arcola v. Wilkinson, Ill., 84 N. E. Rep. 264.

68. **Judges—Disqualification to Act.**—That a municipal court has previously tried a case which has been returned for another trial does not disqualify that court to again try the case.—Sutton v. City of Washington, Ga., 60 S. E. Rep. 811.

69. **Judgment—Res Judicata.**—A judgment cannot be pleaded as res judicata, where it does not pass on the issues involved in the pending action.—Arcadia Cotton Oil Mill & Mfg. Co. v. Fisher, La., 46 So. Rep. 28.

70. **Support in Pleadings.**—Whether the judgment is supported by the pleadings depends not on a reasonable construction of all the complaint alone, but on a reasonable construction of all the pleadings considered together.—Chesney v. Chesney, Utah, 94 Pac. Rep. 989.

71. **Jury—Right to Jury Trial.**—A direct attack on the validity of a liquor election is triable before a judge and a jury.—Wallace v. Salisbury, N. C., 60 S. E. Rep. 713.

72. **Justices of the Peace—Jurisdiction.**—When, in pursuance of provisions of law, a magistrate acquired jurisdiction of the person of defendant, such jurisdiction remains effective until it is shown without virtue of law.—Lynch v. Ball, S. C., 60 S. E. Rep. 691.

73. **Landlord and Tenant—Covenants for Improvements.**—Failure to make improvements within eight months and prior to an offer to purchase at an agreed price provided in a lease held not such an unreasonable delay in complying with the provisions of the lease as to warrant forfeiture of defendants' rights.—Merrill v. Hexter, Or., 94 Pac. Rep. 972.

74. **Leases.**—Where a lease provides that the lessee shall not transfer the lease, the lessee is without authority to transfer to a subtenant the right of renewal.—Audubon Hotel Co. v. Braunnig, La., 46 So. Rep. 33.

75. **Lien for Supplies Furnished.**—While a landlord cannot acquire lien by voluntarily assuming without consent of the tenant the liability for the supplies furnished by another nor obtain a lien as surety for payment of his tenant's debt, yet he is entitled to a lien where, at the request of the tenant, he directs that supplies be furnished to the tenant and assumes sole liability for the debt.—Henderson v. Hughes, Ga., 60 S. E. Rep. 813.

76. **Larceny—Indictment.**—In prosecution for larceny, if the ownership of the property is unknown, it may be so charged in the indictment, but if it was known, or could have been ascertained, there is a fatal variance.—Ray v. State, Ga., 60 S. E. Rep. 816.

77. **What Constitutes.**—Where one takes property of another under an honest belief of right in himself, he is not guilty of larceny.—State v. Bailey, W. Va., 60 S. E. Rep. 785.

78. **Limitation of Actions—Action by Former Insane Person.**—Limitations on an action to recover land sold while plaintiff was a lunatic against his committee held to commence to run when he was discharged as restored to sanity and to continue notwithstanding a recurrence of insanity.—Howard v. Landsberg's Committee, Va., 60 S. E. Rep. 769.

79. **Bar of Debt As Affecting Security.**—Where land was conveyed by a trust deed as security for a debt, the bar of limitations against the personal liberty of the debtor was ineffective to destroy the lien on the property conveyed.—In re Straub, U. S. D. C., N. D. W. Va., 158 Fed. Rep. 375.

80. **Running of Statute.**—Where a debtor is out of the state when cause of action accrues, limitations do not begin to run until he comes into the state, and it will continue to run so long as he remains in the state.—Gibson v. Simmons, Kan., 94 Pac. Rep. 1013.

81. **Literary Property—Uncopyrighted Publication.**—Neither a book nor a photograph can continue to be the author's exclusive property after it has been printed and offered to the public for sale without being copyrighted.—Bamforth v. Douglass Post Card & Machine Co., U. S. C. C., E. D. Pa., 158 Fed. Rep. 355.

82. **Mandamus—Acts of Public Officers.**—The fact that the time within which a list of persons who have personally paid their poll tax should be filed by a city treasurer has passed held no ground for refusing mandamus to compel him to file such list, when there is time to accomplish the purpose intended by the provision of the constitution requiring such list.—Tazewell v. Herman, Va., 60 S. E. Rep. 767.

83. **Marriage—Presumption.**—The presumption of marriage arising from living together as man and wife and general reputation may be rebutted by proof that no marriage ever took place, or that the marriage was void for some nullity established by law.—Eames v. Woodson, La., 46 So. Rep. 13.

84. **Master and Servant—Assumption of Risk.**—A master is not liable to his servant injured in a boiler explosion for failure to apply a hammer test to the flues, where it appeared that such test could not have been applied.—Ware v. Ithaca St. Ry. Co., 109 N. Y. Supp. 426.

85. **Exposure to Infectious Disease.**—It is the duty of a master to exercise reasonable care to protect his servants from exposure to con-

tagious or infectious disease while in the performance of their work, and such duty, like that to provide a reasonably safe place and appliances, is absolute, and cannot be delegated.—*O'Connor v. Armour Packing Co.*, U. S. C. C. of App., Fifth Circuit, 158 Fed. Rep. 241.

86. Mechanic's Liens—Nature of Remedy.—The remedy by enforcement of a mechanic's lien is merely cumulative under the statute, and hence is not affected by the submission of the claim to arbitrators, except as to the amount to be collected by its enforcement in case the arbitration is legally conducted.—*Sorg v. Crandall*, Ill., 84 N. E. Rep. 181.

87. Mortgages—Change in Form of Debt.—Under a judgment on mortgage notes, the mortgaged premises were sold. Held, that the mortgage should be satisfied out of the fund before a judgment against mortgagor, younger than the mortgage, but older than the judgment based on the mortgage notes.—*Hughes v. Mt. Vernon Bank*, Ga., 60 S. E. Rep. 809.

88.—Extension of Time for Payment.—An agreement to extend the time of payment of a mortgage in consideration of the payment of interest and a sum in addition thereto by an owner of the property who is not personally bound to pay the interest is valid.—*Krebs v. Carpenter*, 109 N. Y. Supp. 482.

89. Municipal Corporations—Acceptance of Work.—Where the mayor and council have passed upon and accepted a street improvement as satisfactory, their action held binding on the property owners.—*Ferguson v. City of Coffeyville*, Kan., 94 Pac. Rep. 1010.

90.—Change of Street Grade.—The mere fact of an issue of estoppel to claim damages from raising the grade of a sidewalk is not sufficient to prevent recovery of damages if the estoppel is not proved.—*City Council of Greenville v. Earle*, S. C., 60 S. E. Rep. 1117.

91.—Defective Streets.—A city having notice of the general progress of subway work held bound to know that the work was likely to leave dangerous holes in the streets which it must properly guard.—*McDonald v. Degnon-McLean Contracting Co.*, 109 N. Y. Supp. 519.

92. Negligence—Meaning of "Per Se."—The words "per se," when used as descriptive of negligence, merely refer to the method by which its existence is to be ascertained from the facts.—*Platt v. Southern Photo Material Co.*, Ga., 60 S. E. Rep. 1068.

93.—Res Ipsa Loquitur.—Under the rule of *res ipsa loquitur*, negligence may be inferred from the accident and the attending circumstances.—*Eaton v. New York Cent. & H. R. R. Co.*, 109 N. Y. Supp. 419.

94. Nuisance—Right of Injunction.—Landowners held entitled to relief by injunction in equity to restrain as a nuisance the operation of smelters, the fumes from which destroyed their trees and crops, poisoned their stock, and endangered the health of themselves and their families.—*American Smelting & Refining Co. v. Godfrey*, U. S. C. C. of App., Eighth Circuit, 158 Fed. Rep. 225.

95.—Use of Land.—The operation by one on his own premises of a lawful business is not a source of danger to a traveler on a highway, unless the business is maintained in an improper place or in an improper manner.—*Ft. Wayne Cooperage Co. v. Page*, Ind., 84 N. E. Rep. 146.

96. Partnership—Accounting.—Under a partnership agreement, held, on bill for an accounting, that depreciation in the value of personality furnished by one partner for use in the business was not a proper charge against the partnership.—*Winnard v. Clinton*, Ill., 84 N. E. Rep. 261.

97.—Who Are Partners.—An owner of an undivided interest in property, who, with the other owners, transacted business with reference to such property under a company name, where there was, in fact, no partnership between them cannot be held liable as a partner on a note, given by the others in the name of such company, but for which he refused to assume personal liability to one who had been their legal adviser and was fully acquainted with all the facts as to their relationship.—*Reiniger v. Barrie*, U. S. C. C., E. D., Pa., 158 Fed. Rep. 362.

98. Payment—Mistake of Fact.—To authorize a recovery on the theory that plaintiff has paid defendant money under a mistake of fact, plaintiff must show a mistake as to the facts and not that he was ignorant of the means of proving the facts.—*Citizens' Bank of Fitzgerald v. Rudisill*, Ga., 60 S. E. Rep. 818.

99. Perpetuities—Trusts.—A provision in a will that trustees might hold property intact until a certain date held not to affect the trust, where the trust would begin and end at a certain time, notwithstanding the acts of the trustees in selling or holding the property.—*Tonne'e v. Wetmore*, 109 N. Y. Supp. 349.

100. Physicians and Surgeons—Practice of Medicine.—Under Laws 1903, p. 61, c. 40, the practice of medicine consists either in opening an office for practice, or announcing a general willingness to treat the sick or prescribing or directing for the use of any specified person drugs, medicines, or other agencies having received or with intent to receive compensation.—*Territory v. Lotspeich*, N. M., 94 Pac. Rep. 1025.

101. Principal and Agent—Termination of Agency.—The depositary who holds a check to be delivered to the payee on the performance of a contract also held by him ceases to be the agent of the maker when the contract is performed.—*Lowden v. Wilson*, Ill., 84 N. E. Rep. 245.

102. Quietting Title—Cloud on Title.—The jurisdiction of a federal court to restrain the enforcement of a state court judgment is not effective to remove a cloud from the title of realty cast by the judgment.—*Schultz v. Highland Gold Mines Co.*, U. S. C. C., D. Oreg., 158 Fed. Rep. 337.

103. Railroads—Contract for Exemption From Liability.—That persons storing seed in a seedhouse, erected on a railroad's right of way knew of a contract to save the railroad harmless from all damages held not to affect their right to recover for loss by fire.—*Devlin v. Charleston & W. C. Ry. Co.*, S. C., 60 S. E. Rep. 1123.

104. Reference—Report of Auditor.—Where the auditor made no final decision for either party, but only found and reported the facts, the trial court could draw such inferences from the statements in the report as they fairly warranted, even though they were contrary to the auditor's conclusions.—*Beers v. Wardwell*, Mass., 84 N. E. Rep. 306.

105. Reformation of Instruments—Intent of

Parties.—The legal presumption that an instrument correctly expresses the intent of the parties must be overcome by clear and satisfactory proof.—*Isner v. Nydegger*, W. Va., 60 S. E. Rep. 793.

106. **Sales**—Estoppel.—A seller of an appliance he'd estopped from denying the buyer's right to recover the amount paid in settlement of an infringement suit.—*National Metal Edge Box Co. v. Gotham*, 109 N. Y. Supp. 450.

107. **Sheriffs and Constables**—Settlement with Successor.—An ex-sheriff is not chargeable with interest on the balance due from him, until demand made from his successor in office.—*State v. Keadle*, W. Va., 60 S. E. Rep. 798.

108. **Specific Performance**—Part Performance.—A person failing to establish such part performance of an oral contract as to take it out of the statute of frauds held entitled in equity to compensation for the value of permanent improvements and to have a lien therefor, but not to payment for services in clearing land.—*Ranson v. Ranson*, Ill., 84 N. E. Rep. 210.

109. **Taxation**—Estoppel to Claim Under Tax Deed.—One who as between himself and another was under duty to pay the taxes on real estate, but who permitted the same to be sold for taxes and afterward acquired the tax title, cannot avail himself of the same or of the fact of sale to defeat the title of such other.—*Anderson v. Messenger*, U. S. C. C. of App., Sixth Circuit, 158 Fed. Rep. 250.

110. **Taxation**—Tax Deeds.—Where redemptioner has in proper time made a sufficient offer to redeem from a tax sale, which the purchaser has rejected on grounds other than the nonproduction of the money, equity will entertain a bill to cancel the tax deed.—*Kelly v. Gwatkin*, Va., 60 S. E. Rep. 749.

111.—**Tax Deeds**.—Where a purchaser at tax sale had a right to believe that he acquired a good title and in good faith placed improvements thereon, though the owner of the land was not entitled to the improvements and the tax-title purchaser was entitled to the value thereof.—*Page v. Kidd*, La., 46 So. Rep. 35.

112. **Telegraphs and Telephones**—Act of God.—A telegraph company held not relieved from liability for delay in transmitting a message on the ground that the grounding of a wire by the fall of a tree was an act of God, in the absence of a showing of due care and that the fall of the tree was an unforeseen and unusual action of nature.—*Fall v. Western Union Telegraph Co.*, S. C., 60 S. E. Rep. 697.

113.—**Delay in Transmitting Message**.—In an action against a telegraph company for damages for delay in transmitting and delivering a telegram, evidence held sufficient to sustain a verdict against the company.—*Fall v. Western Union Telegraph Co.*, S. C., 60 S. E. Rep. 697.

114.—**Municipal Regulation As to Rates**.—A citizen of a city held entitled to insist on the enforcement of a contract between the city and a telephone company limiting the rate to be charged subscribers.—*Rochester Telephone Co. v. Ross*, 109 N. Y. Supp. 381.

115. **Towns**—Procedure of Meetings.—Though in general the action of town meetings conforms to parliamentary procedure, they are not governed by the strict rules of legislative practice.—*Wood v. Town of Milton*, Mass., 84 N. E. Rep. 332.

116. **Trial**—Prejudicial Remarks by Court.—

Where the language of the court in rulings depreciates the contention of either party, but the contention is permitted to go to the jury, they should be so instructed as to leave the contention in as fair a light as if such remarks had not been made.—*Martin v. Thrower*, Ga., 60 S. E. Rep. 825.

117. **United States**—Military Governor of Cuba.—Ratification by the executive, Congress and the treaty making power of the action of the military governor of Cuba in abolishing a hereditary office makes his act that of the United States, and exonerates him from liability as for a tort in violation of the law of nations or of a treaty.—*O'Reilly De Camara v. Brooke*, U. S. C. C., 28 Sup. Ct. Rep. 439.

118. **Vendor and Purchaser**—Effect of Intoxication.—Habits of intoxication not incapacitating the person from attending to the ordinary transactions of life will not avoid an agreement to convey real estate on evidence that the vendor was sober at the time and understood the transaction.—*Girault v. Feucht*, La., 46 So. Rep. 26.

119.—**Effect of Recording**.—The recording of a deed prior in date does not affect the title of the grantee under a prior recorded deed of a later date, though the consideration for the later deed be not entirely paid at the time of recording the prior deed.—*Lowden v. Wilson*, Ill., 84 N. E. Rep. 245.

120.—**Shortage in Acreage**.—Where an owner conveys, out of a tract of land, by one deed to each of several grantees, a specific number of acres as an undivided part thereof, such grantees are held entitled to have set out to them out of such larger tract the number of acres called for by the deed.—*First Nat. Bank v. Crawford*, W. Va., 60 S. E. Rep. 781.

121. **Waters and Water Courses**—Pollution of Stream.—Several lower riparian landowners have such a community of interest that they may join in a petition to restrain an upper proprietor or a stranger from causing the stream to overflow or from polluting its water.—*Horton v. Fulton*, Ga., 60 S. E. Rep. 1059.

122.—**Water Supply**.—Where a city uses water that it conveys through a ditch running across the field of another, it is its primary duty to fence or protect the ditch and the waters therein from contamination.—*City of Bellevue v. Daly*, Idaho, 94 Pac. Rep. 1036.

123. **Weapons**—Deadly Character.—Where an indictment charged that defendant carried a certain weapon, and the evidence showed that defendant carried a black jack not specified in the indictment, and there was no evidence as to its deadly character, a conviction was erroneous.—*State v. Lett*, W. Va., 60 S. E. Rep. 782.

124. **Witnesses**—Competency of Husband.—A husband has no estate during coverture in the separate estate of his wife, and he is therefore a competent witness to establish his wife's title to land by evidence of transactions with a decedent.—*Hudkins v. Crim*, W. Va., 61 S. E. Rep. 166.

125.—**Cross Examination**.—It was not an abuse of discretion for the court to refuse to require plaintiff, on cross-examination, to answer whether he did not feel unkindly toward defendant, and had not made a complaint against him for felony since he bought the land in controversy from the state.—*Taylor v. McFatter*, Tex., 109 S. W. Rep. 395.

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SUPERIOR RIGHT OF PARENT TO CUSTODY OF MINOR CHILD.

Our position on the question of the superior right of a father to the custody of his minor child is well known. We gave ourselves free rein not such a long while ago in denouncing the action of a nisi prius court in refusing to give a child to its father where it was not shown that he was incompetent to care for it. 65 Cent. L. J. 175.

We attempted to show in that editorial that the "best interest of the child" rule was being prostituted by directing its application to circumstances where it was never intended it should operate, and was subverting the rightful authority of the father.

Now comes the case of *Peese v. Gellerman*, 110 S. W. Rep. 196, in which the Court of Civil Appeal of Texas deprives a father of his right to his little daughter whom he had turned over to her maternal aunt after her mother's death and whom he desired to reclaim upon his second marriage.

The father was shown to be a good man, well fixed in this world's goods and of a good, loving disposition. But the maternal relatives in resisting the father's claim were permitted to drag out of the closet of the second wife an old skeleton which in effect showed she had once been seduced by an ardent lover several years before her marriage when she was but seventeen years of age, and that the child of this unfortunate union was still living with its mother. The court deliberately refused to follow the great Missouri case of *In re Scarritt*, 76 Mo. 565, which is the most wonderfully clear declaration of the father's superior

right to his minor child ever enunciated by any court in this country, and permits this testimony as to certain previous wrongful acts by the second wife to deprive a father of the child of his being and the child of that natural love and affection which it can receive from no other source. The court plays so loosely on the heart-strings of parental affection that we are inclined to believe that the writer of this opinion has probably never experienced those deep emotions that draw a father's heart to his child. Courts are trifling with a very serious matter when they thus carelessly ignore the father's right to and authority over his children, a right and authority which existed in the days of the Patriarchs long before the existence of the state. It is upon the similitude of the parental relation that the state derives much of its own authority as *parens patriae* and when its courts strike down the superior rights of the fathers of the land over the persons of their own children, they have laid the axe at the root of the tree from which all proper governmental authority proceeds.

We are not unmindful of the fact that the Texas court has a considerable array of authority which it may cite to support it in its assumption of a right to consider the opportunities and prospects of the child alone, leaving out of consideration any *superior right* in the father. If the courts are going to put in the balances as against the father's *paramount* right to the custody of the child, the desires of some rich relative to keep the child and to furnish her with a better home than the father can provide, the seeds of rebellion have been sown in the very nature of our being against a government which will tear our offspring from our arms and give them to another, because, forsooth, such other is better able to care for it. The courts and judges who have been guilty of setting up such standards had better spend some time in studying carefully the great opinion of the Missouri Supreme Court in *In re Scarritt*, *supra*.

In the principal case it is refreshing to observe that one member of the court appreciated the importance of the father's superior right to his child. Judge Neill, dissenting from the harsh opinion of the majority of the court, says: "I believe that under the law and facts in this case the appellant has the right to take his little daughter home and treat her as a member of his family. I think he has this right, because the God of nature has given it to enable him to discharge the duty he owes as a father to his child. Where a right emanates from such a source, the one to whom it is given, if fit to perform the duty it imposes, cannot be rightfully deprived of it by the courts of any country. The law itself recognizes the right primarily of the parent to the custody of his minor child, and but re-echoes the voice of nature in the duty it imposes. The mother of the child being dead, the presumption is that its father has the right to its custody; and it devolves upon the party claiming adversely to it to show that it has been forfeited by him, that is, it must be proved the father is not a fit person to rear and nurture his own child."

NOTES OF IMPORTANT DECISIONS

TRIAL AND PROCEDURE—WHEN PARTY ERRONEOUSLY ASSUMES THE BURDEN OF PROOF.—In *Burgraf v. Byrnes* (Minn.), 116 N. W. Rep. 838, it is held that where a party erroneously assumes the burden of proof as to a particular fact, the mistake will not be corrected in the appellate court. The action was one to recover damages for the unauthorized compromise of a judgment. The defense seems to have been that the judgment was comparatively worthless. In the trial plaintiff assumed the burden of proof as to the value of the judgment and undertook to prove that it was worth face value. Verdict and judgment for defendant. Plaintiff assigned as error the refusal "of the court to direct a verdict for the full amount of damages, as measured by the judgment and interest, on the ground that the presumption is that the judgment is worth its face value." This is held not to have been erroneous, " * * * for the plaintiff assumed that burden and undertook

to show the actual value of the judgment. Plaintiff, instead of electing to stand on the theory on which he now bases error in the rulings of the court, introduced affirmative evidence by which the actual value of the judgment was sought to be shown. Having elected so to do, he is in no position to complain of the acceptance by that court of his position. He is within the rule that 'where a party erroneously assumes the burden of proof as to a particular allegation, or the burden of evidence as to a particular fact, that mistake will not be corrected in the appellate court,' " citing 16 Cyc. 26 (B); 2 Cyc. 675 (IX); *Geiser Mfg. Co. v. Yost*, 90 Minn. 47, 95 N. W. Rep. 584; *Earl Fruit Co. v. Thurston Co.*, 60 Minn. 351, 62 N. W. Rep. 439; *Benjamin v. Shea*, 83 Iowa, 392, 49 N. W. Rep. 989. And see *Denton v. C., R. I. & P. Ry. Co.*, 52 Iowa, 161, 2 N. W. Rep. 1093, 35 Am. Rep. 263; *Stewart v. Outhwaite*, 141 Mo. 562, 44 S. W. Rep. 326. "Where parties consent to try their case upon a certain theory of what the law is, though it be erroneous, they cannot complain at the result, if it be correct according to that theory." *Davis v. Jacoby*, 54 Minn. 144, 55 N. W. Rep. 908. And see 66 C. L. J. 291. There is excellent authority for the proposition that where a case is tried on one theory, it cannot be presented in the appellate court on another theory. In other words, having fixed on a theory, one must stand or fall on that theory.

EVIDENCE—TELEPHONIC COMMUNICATIONS.—As science and civilization advances the law attempts to follow, if not as promptly as it should, at least not a great ways off. The case of *Knickerbocker Ice Co. v. Gardiner Dairy Co.*, 69 Atl. Rep. 406, discusses the admissibility and effect of telephonic communications as evidence.

In that case the evidence of Mr. Whbourn, superintendent of the Gardiner Company, in reference to a telephone conversation with the Knickerbocker Company, was admitted, subject to exception. He called up the company and inquired who was there, and the party at the phone said the Knickerbocker Ice Company. He did not recognize the voice of the person talking. The man at the phone stated the price of the ice, said they had plenty of it, and would let the plaintiff have it provided it gave them all its trade. The plaintiff got five or six loads that day (June 29th), and all the orders were by telephone. He had his talks with the same person, and in each case he got all the ice he ordered. One of defendant's exceptions was to the refusal to strike out that evidence.

The trial court admitted the evidence and the appellate court after reviewing the authorities upheld the action of the trial court, saying: "As it is a character of evidence that

might be used improperly, courts should be careful in the application of the rule. In this case, however, we have no difficulty in sustaining the rulings of the lower court.

The authorities amply sustain the decision in this case. In *Murphy v. Jack*, 142 N. Y. 215, 36 N. E. Rep. 882, 40 Am. St. Rep. 590, which was an application to vacate an attachment which had been issued on an affidavit made on information over the telephone, the court said: "There would be no objection to the information having been conveyed through the medium of the telephone, if it had been made to appear that the affiant was acquainted with the plaintiff and recognized his voice; or if it had appeared, in some satisfactory way, that he knew it was the plaintiff who was speaking with him." In *Wolfe v. Mo. Pac. R. Co.*, 97 Mo. 473, 11 S. W. Rep. 49, 3 L. R. A. 539, 10 Am. St. Rep. 331, it was held that a conversation by telephone between a witness and another person in the private office of a party is not inadmissible because the witness does not identify the voice of the other person as that of the party or his clerk. Barclay, J., said: "When a person places himself in connection with the telephone system through an instrument in his office, he thereby invites communication in relation to his business through that channel. Conversations so held are as admissible in evidence as personal interviews by a customer with an unknown clerk in charge of an ordinary shop would be in relation to the business therein carried on." See, also, *Mo. Pac. Ry. Co. v. Heldenheimer*, 82 Tex. 201, 17 S. W. Rep. 608, 27 Am. St. Rep. 861; *Gen. Hospital Soc. v. N. H. Rendering Co.*, 79 Conn. 581, 65 Atl. Rep. 1065; *Kan. City Star Co. v. Standard Warehouse Co.*, 123 Mo. App. 13, 99 S. W. Rep. 765; *Godair v. Ham. Nat. Bank*, 225 Ill. 572, 80 N. E. Rep. 407, 116 Am. St. Rep. 172; *Jones on Ev.*, sec. 210; *Wigmore on Ev.*, sec. 2155. The latter says: "No one has ever contended that if the person first calling up is the very one to be identified, his mere purporting to be A. is sufficient, any more than the mere purporting signature of A. to a letter would be sufficient. Ante, sec. 2148. The only case practically presented therefore is that of B.'s calling up A. and being answered by a person purporting to be A. There is much to be said for the circumstantial trustworthiness of mercantile custom (Ante, sec. 95) by which, in average experience, the numbers in the telephone directory do correspond to the stated names and addresses, and the operators do call up the correct number, and the person called does in fact answer. These circumstances suffice for some reliance in mercantile affairs; and it would seem safe enough to treat them in law as at least sufficient evidence to go to the jury, just as testimony based on prices cur-

rent is received. Ante, sec. 719. This view has received some judicial support." The author then goes on to consider the case where the antiphonal speaker does not purport to be a particular person, but merely some member of the office staff authorized to make a contract or an admission, and added: "On the principle above suggested (though not with the same force) mercantile experience may well suffice, by which customarily the person who is in fact summoned to the telephone and proceeds to conduct the negotiation is prima facie a person authorized to do so, precisely as a person receiving money at the cashier's desk is presumably authorized to do so. Upon this point there is little judicial inclination to take the liberal view."

THE EFFECT UPON THE EXERCISE OF THE RIGHT OF EMINENT DOMAIN OF THE INTERMINGLING OF A PRIVATE WITH A PUBLIC USE.

It is a fundamental principle of law that property cannot be taken by the exercise of eminent domain except for some public use. As to what is meant by the term "public use" there is considerable conflict among the authorities. On the one hand it is held that the public must have an absolute right to a certain definite use of the private property on terms and for charges fixed by law, and that the owner must be compelled by law to permit the general public to enjoy it.¹

Other cases hold that the term public use is synonymous with public benefit or advantage, and that it is not essential that the entire community or even an appreciable portion of it should directly participate in the improvement in the use a public one. Some hold that the convenience of the public is the exercise of the right.² This latter doctrine has been employed to justify the exercise of the right in connection with the milldam and drainage statutes of certain states. These statutes have been regarded by many of our courts as the out-growth

(1) *Pittsburg R. Co. v. Benwood Iron Works*, 31 W. Va. 710.

(2) *Omstead v. Camp*, 33 Conn. 532, 89 Am. Dec. 221; *Pittsburg v. Scott*, 1 Pa. St. 308.

of necessity, unjustifiable on principle. "The Milldam acts originated in New England at a time when transportation facilities were poor and the public gristmill to which the people might resort was not only a great public benefit but also a public necessity. The early authorities sustained the acts upon the ground of the incidental public benefit resulting to the community from such mills."³

As was stated in the last case cited, "It is probably impossible to reconcile all the authorities, and to make them entirely consistent with any definition of a public use. With the exception of a certain line of cases which have grown out of peculiar conditions and apparent necessity, the authorities consistently recognize the fact that a public use means a use by the public. The question of the general public benefit is necessarily also involved, but the two do not always exist together."

The question whether a certain use is public or private is a judicial and not a legislative one. It is the sole function of the legislature to decide the question *when* the power of eminent domain may be exercised in the promotion of some public use.

The question often arises as to the effect upon the exercise of the right of the intermingling of a private with a public use. In a number of instances state legislatures have enacted statutes, the purpose of which was to legalize a taking in such a case. In 1875 a law was passed in Wisconsin⁴ authorizing the erection of a dam across a navigable river at public cost, either for the purpose of waterworks for the city, or for the purpose of leasing the water power for private purposes. The supreme court of that state promptly held, upon a case involving the statute being brought before it, that as the power was alternative and optional, either for a public or private use, that it was unconstitutional. Likewise a Michigan statute⁵ which attempted to legal-

ize a taking of water from a stream both for public and private uses, was declared unconstitutional by the supreme court of that state.⁷ It is plain that under the constitutional provisions in most of our states such legislation is invalid as transgressing the limitation that the power of eminent domain can only be exercised for a public use.

If however the two purposes may be separated, that which is lawful may be sustained.⁸ But to permit of such a separation the power granted must not be an optional one, subject to the election of the grantee. In such a case the valid and void provisions are inseparable and the whole statute must be declared unconstitutional. The election being inherent in the grant it is not in the power of the courts to separate the different parts and to uphold some while refusing to uphold the others.⁹ Moreover in case a statute provides for a taking for public uses only, an application for the exercise of the right which would leave the grantee an option as to the use to which the property would be put must be refused. The improvement must be devoted to the public use independently of the will of the person taking it.¹⁰

The question that more frequently arises however is whether or not, where a taking for a public use alone is authorized, an incidental private use may be permitted. It is plain that the converse cannot be allowed. To permit a person to take private property by alleging a public use, the principal object in fact being to devote it to private uses would constitute a palpable evasion of the law. The fact that the public use, so far as it went, was to be promoted bona fide would not affect the result. Thus in an early case in New York

(7) *Berrien Co. v. Berrien Circ. Judge*, 133 Mich. 48, 94 N. W. Rep. 379.

(8) *State v. Commissioners*, 5 Ohio St. 497; *State v. Clarke*, 54 Mo. 17.

(9) *Attorney General v. Eau Claire*, 37 Wis. 400.

(10) *Ryerson v. Brown*, 35 Mich. 333; *State ex. rel. Harlan v. Centralia, etc. Co.*, 42 Wash. 632.

(3) *Minnesota Canal & P. Co. v. Koochiching Co.*, 107 N. W. Rep. 405.

(4) *Laws 1875*, ch. 333.

(5) *Attorney General v. Eau Claire*, 37 Wis. 400.

(6) 2 Com. Laws, Sec. 6806.

where a person asked to condemn land for a grist-mill, a saw-mill and a paper-mill, a statute providing that the first mentioned purpose alone constituted a public use, the court refused the demand holding that, "If an application of this kind were granted a like application for the erection of iron-works or any other establishment requiring water power might be made and would be entitled to equal favor, provided the applicant as a pretext were to associate a grist-mill with his other works."¹¹

But where the public use is the principal factor and the private is truly incidental the law has no objection.¹² Thus a railroad corporation may take land for the purpose of erecting buildings to be used in connection with the road, though such buildings are not part of the equipment for transportation, which alone constitutes the public use.¹³

The private use must not however be too remotely connected with the public use. Where a Massachusetts railroad corporation took certain land by eminent domain for purposes connected with the operation of its road, and then leased the property for warehouse purposes, it was held that a writ of entry would lie against the corporation. "Although the railroad might derive some advantage from the receipt and delivery of their goods at these buildings instead of in its own freight houses yet that circumstance was not sufficient to qualify the character of the occupation of the buildings so as to bring it within the range of any purpose for which the corporate franchises were granted."¹⁴

The question whether or not the private purpose is in fact but an incident will usually be decided by the jury.¹⁵

(11) *Harding v. Goodlett*, 3 Yerg. 40, 24 Am. Dec. 546.

(12) *Lake Koen Co. v. Klein*, 63 Kan. 484; *Bridal Veil Co. v. Johnson*, 30 Ore. 205, 46 Pac. Rep. 790; *Toledo, etc. Co. v. E. Saginaw Co.* 72 Mich. 227, 40 N. W. Rep. 426.

(13) *Tucker v. Tower*, 9 Pick. 109.

(14) *In re Proprietors, etc. v. N. & L. Co.* 104 Mass. 1.

(15) *Lake Koen, etc. Co. v. Klein*, 63 Kan. 484, 65 Pac. Rep. 684.

Where it appears that more land is demanded than the public purpose requires, only so much as is necessary for that purpose will be granted.¹⁶ Should the applicant by misrepresentation secure more than proves to be necessary he may be ousted from the part that is not essential.

Though fraud will not be imputed to a person who demands certain property under the exercise of this right the courts will nevertheless carefully scrutinize the application. To ascertain the probable use to which the property is to be put the charter of the corporation, in the case of a corporation, is looked to, but is by no means conclusive. The actual business to be conducted will in all cases be ascertained.¹⁷ The fact that the charter of a corporation embraces both public and private uses does not per se deprive such corporation of the right of eminent domain in case the actual use intended is public.

ROBERT L. McWILLIAMS.

Spokane, Wash.

(16) *Cooley Const. Lim.* 6th ed. p. 664.

(17) *In re Niagara Falls & W. R. Co.*, 108 N. Y. 375.

TORTS—INTERFERENCE WITH CONTRACTUAL RELATIONS.

KNICKERBOCKER ICE CO. OF BALTIMORE CITY v. GARDINER DAIRY CO.

Court of Appeals of Maryland. March 31, 1908.

Plaintiff having contracted to purchase ice from the S. Company, and having no contractual relations with defendant, defendant notified the S. Company, who received from defendant ice with which to perform its contract with plaintiff and others, that defendant would refuse to deliver any ice whatever to it unless it refrained from delivering ice to plaintiff, whereupon the S. Company broke its contract with plaintiff, and plaintiff was required to purchase ice from defendant under less advantageous terms and conditions. Held, that defendant's act in inducing the S. Company to break its contract with plaintiff, though not malicious, was unlawful and for the purpose of procuring plaintiff's trade for itself, and was therefore actionable.

BOYD, C. J.: This is an appeal from a judgment rendered against the appellant in favor of the appellee for causing the Sumwalt Ice & Coal Company to break a contract

between it and the appellee, by which the former had agreed to furnish the latter with ice. As the first question to be considered is a demurrer to the declaration, which was overruled, we will state the material allegations made in it. It is alleged that the plaintiff was engaged in the dairy business in June, 1906, and required a large quantity of ice during the spring and summer months; that, in order to meet its requirements, it entered into a contract with the Sumwalt Company whereby that company contracted to deliver to the plaintiff, and the plaintiff agreed to buy from it, an amount not exceeding 20 tons of ice each day from the date of the contract until the completion of the plaintiff's plant then in course of construction at the price of \$5 per ton delivered; that at the time the Sumwalt Company was purchasing ice in large quantities from the defendant, which was engaged in the manufacture of ice; that the defendant, learning of the contract between the plaintiff and the Sumwalt Company, notified the latter that it would refuse to deliver any ice whatever to it, unless it refrained from delivering ice to the plaintiff; that said Sumwalt Company being compelled by the exigencies of its business to secure ice from the defendant, and being alarmed by the threat of the defendant, broke its said contract with the plaintiff, and advised it that, because of the action of the defendant, it could not carry out its contract with the plaintiff; that thereby the plaintiff was compelled to purchase ice directly from the defendant at a price considerably greater, and on terms considerably less advantageous to it, than it was enjoying under its contract with the Sumwalt Company. It is further alleged that the action of the defendant in causing the Sumwalt Company to break its contract with the plaintiff "was with the desire and intention on the part of the defendant of injuring the plaintiff, and of obtaining a benefit for itself; that said action was deliberate and malicious, and inspired by the wish and purpose to force the plaintiff to buy ice directly from the defendant at a larger price, in larger quantities, and for a longer period than were required of the plaintiff under the terms of its aforesaid contract with the Sumwalt Ice & Coal Company, by which unlawful and malicious action on the part of the defendant the plaintiff has been greatly damaged."

There is great conflict between judges and law writers as to how far there is a remedy for interference with contract relations, and it would be a useless task to undertake to reconcile them. They quite generally agree in their conclusions when the relation of mas-

ter and servant exists, but even then reach the same point by different routes. *Lumley v. Guye*, 2 E. & B. 216, is the leading case on the subject. Prior to the dissenting opinion delivered by Justice Coleridge in that case, it seems to have been assumed that the action for enticing servants was a common-law action, but in that opinion he asserted, and with his marked ability undertook to establish, that such was not the case, and that it was founded on the statute of laborers of 23 Edw. III., and that both on principle and authority was limited by it. But, however that may be, that statute was never in force in this state, and could not have been applicable to conditions here, and the right to such action has always been regarded as a part of the common law. Justice Coleridge also undertook to show that the general rule of the English law in respect to breaches of contracts was to confine its remedies by action to the contracting parties; but while it may be conceded that, as a rule, such actions had been confined to those parties, it does not follow that the right of action in third parties did not exist. In *Lumley v. Guye* there was a demurrer to each of the three counts in the declaration, and it was held by Judges Wightman, Erle, and Crompton, quoting from the syllabus, that "the counts were all good, and that an action lies for maliciously procuring a breach of contract to give exclusive personal services for a time certain, equally whether the employment has commenced or is only in fieri, provided the procurement be during the subsistence of the contract, and produces damage, and that, to sustain such an action, it is not necessary that the employer and employed should stand in the strict relation of master and servant. *Semble*, by the same judges, that the action will lie for the malicious procurement of the breach of any contract, though not for personal services if by the procurement damage was intended to result, and did result, to the plaintiff." In *Ensor v. Bolgiano*, 67 Md. 190, 9 Atl. Rep. 529, Mr. Ensor, an attorney, sued the defendant, alleging that, with malice towards the plaintiff, he induced one Allen to compromise his case against a turnpike company in which the defendant had stock, and to break his contract with the plaintiff to pay him a contingent fee. This court disposed of the case on the ground that there was no legally sufficient evidence to support the action, and declined to express any opinion on the law as laid down in *Lumley v. Guye*, although Judges Yellot and Bryan filed dissenting opinions in which they approved of the doctrine announced in that case. In *Lucke's Case*, 77 Md. 396, 26 Atl. Rep. 505, 19 L. R. A.

408, 39 Am. St. Dep. 421, it was held that where an employee, who was performing the duties of his position to the entire satisfaction of his employers, was discharged in consequence of a threat from a labor organization that if he was longer retained it would be compelled to notify all labor organizations of the city that the business house of the employers was a nonunion one, and thus subject them to great loss, such interference was wrongful, and an action would lie against the labor organization by the employee for the damage he sustained in consequence of such discharge. The evidence showed that the employee was to continue in the employ of his employers as long as his work was satisfactory, but they reserved the right to discharge him at the end of any week. A member of the firm testified that they would not have discharged him except for the objections of the appellee. This court quoted with approval from *Benton v. Pratt*, 2 Wend. (N. Y.) 385, 25 Am. Dec. 623, that: "Where a contract would have been fulfilled but for the false and fraudulent representations of a third person, an action will lie against such person, although the contract could not have been enforced by action." It also quoted at length from *Chipley v. Atkinson*, 23 Fla. 206, 1 So. Rep. 934, 11 Am. St. Rep. 367, which said that neither the fact that the term of service interrupted was not for a fixed period, nor that there was a right of action against the person induced or influenced to terminate the service, or to refuse to perform his agreement, was of itself "a bar to an action against the third person maliciously and wantonly procuring the termination of, or a refusal to perform, the agreement. It is the legal right of the party to such agreement to terminate or refuse to perform it, and in doing so he violates no right of the other party to it; but, so long as the former is willing and ready to perform it, it is not the legal right, but is a wrong on the part of a third party maliciously and wantonly to procure the former to terminate or refuse to perform it." The court also quoted from *Bowen v. Hall*, L. R. 6 Q. B. D. 338, which we will refer to later. It said that the Lucke case and that of *Lumley v. Gye* "widely differ in important facts, and there is but small analogy in the principles of law properly applicable in each case;" but it will be observed that it announced principles which are analogous to those sought to be applied in this case. It distinctly held that an action by an employee would lie against a third person who maliciously and wantonly procured the termination of the arrangement between the employer and employee, which was not for a definite period, and the facts show that

Lucke was not a mere menial servant, but a skilled "first-class customs cutter."

Some material distinctions between that case and the one before us are apparent; but it does go one step further than the cases usually found in the books in which the relation of master and servant or employer and employee is in any way involved, and there was not as here a binding contract between the parties. Generally speaking, such suits have been by the master for the enticement of his servant, while the Lucke case was by an employee against a third person for causing his discharge by the employer; and it is difficult to see why, upon principle, a party to a contract should be confined to an action against the other party for a breach of it, when a third party has been the deliberate cause of the breach, for his own selfish or malicious purposes. To say that he has his remedy against the other contracting party is in many cases offering a mere shadow for substance, for oftentimes he may have his trouble for his pay, as the other party to the contract may be financially irresponsible. Why should a labor organization, which has the right to organize and act for the protection and benefit of its members so long as it does not infringe upon the rights of others, be responsible for causing the discharge of one who it believes interferes with the interests of its members by being so employed, while an employer of labor can maliciously and wantonly, or for his own selfish purposes, cripple another employer with impunity? If the Clothing Cutters' and Trimmers' Assembly was liable for causing the New York clothing house to discharge Lucke, why should not some importer or wholesale dealer have been liable to that house if he had procured some other importer or dealer with whom it had a contract, and upon whom it was dependent to secure such goods, to break his contract with that house, and thereby force it to deal on disadvantageous terms with the procurer? Such distinction, based on the technical ground that the relation of master and servant exists in the one case and not in the other, would be well calculated to impress laborers with the belief that the law discriminates between labor and capital, making the one responsible, but not the other. Trusts and combinations of capital have ruined many while hiding behind means apparently lawful; but if they cannot be reached when it is shown that they have maliciously and wantonly, or for their own selfish purposes, not only prevented others from making contracts, but compelled contractors to break their contracts, then indeed is the law helpless. Yet that is just what the theory of the appellant,

if adopted, might lead to, and it should not be adopted unless clearly within well-established principles of law. And when we are called upon to determine that question, we are not to be governed entirely by the lack or scarcity of precedents furnishing a remedy. Principles of law ought not to be stretched beyond reason and justice, but they ought not unnecessarily to be so contracted as to allow them to be made use of as instruments of oppression. This court quoted in Lucke's case from *Winsmore v. Greenbank*, Willes' Rep. 581, where it was said: "Special action on the case was introduced for the reason that the law will never suffer an injury and a damage without a remedy." In *Bottomly v. Bottomly*, 80 Md. 162, 30 Atl. Rep. 77, Judge Bryan stated that: "Where it is said that, when the plaintiff has a right he must have a remedy, if he is injured in the enjoyment of it, it must necessarily be understood that the injury must be an act which is unlawful in itself, or that it is rendered unlawful by the circumstances under which it is committed." And in speaking of Lucke's case he said: "We held that the conduct of the defendant was malicious and unlawful, and that it gave the plaintiff a good cause of action. It was a scheme to accomplish an unlawful result by unlawful means." So in *Gore v. Condon*, 87 Md. 368, 39 Atl. Rep. 1042, 40 L. R. A. 382, 67 Am. St. Rep. 352, after stating the facts fully, Judge Briscoe, in delivering the opinion of the court, said: "The question then is whether the conduct of the defendant under the circumstances stated in this case constituted such a wrongful act as will give rise to an action for damages." In that case the plaintiff was the owner of some houses and lots, and the defendant obtained a mortgage thereon from a person he knew was not the owner, and, although knowing that the mortgage was fraudulent and void, caused the tenants of the property to cease paying their rents to the plaintiff, and advertised the property for sale under an ex parte decree of foreclosure on the mortgage, which was afterwards vacated by a court of equity. The tenants moved away, and the plaintiff lost the rents. It was held that, "if a man knows that certain property is not his but another's, and that his apparent title to the same was acquired by fraud and is void, then his intermeddling with such property to the damage of the real owner is an unlawful act for which an action lies." It was also said: "The right to maintain the action can also be sustained, upon the doctrine that a man who induces one of two parties to a contract to break it, intending thereby to injure the

other, or to obtain a benefit for himself, does the other an actionable wrong"—citing Lucke's case, *Angle v. Chicago, etc., Ry.*, 151 U. S. 14, 14 Sup. Ct. Rep. 240, 38 L. Ed. 55, *Lumley v. Guye*, *Bowen v. Hall*, supra, and *Walker v. Cronin*, 107 Mass. 555. It cannot be denied that it is unlawful for a party to a contract to break it, unless, of course, he has sufficient ground for doing so; and therefore, when a third party procures or induces him to do so, he is causing him to do an unlawful act, which is itself unlawful, and the law ought to afford a remedy to the injured party. In the appendix to 87 Maryland there is a note on *Gore v. Condon* by Mr. Brantly, which considered at length the subject of interference with contracts, etc., with his usual clearness. Some of the questions discussed in that note are not involved in this case; for example, the distinction made by some authorities between preventing a contract being made and causing one already made to be broken. This declaration distinctly alleges that a contract had been made, and that the defendant caused the Sumwalt company to break it, and there is testimony tending to sustain those allegations. In Lucke's case it was held that the defendant was liable, although there was no contract in force requiring the employers to continue his employment, but that part of the decision relied on the discharge, connected with the fact that he would have been continued but for the threats and action of the defendant. In addition to the authorities cited in *Gore v. Condon*, supra, there are many others in which it has been held that procuring a breach of an existing contract is actionable. In *Perkins v. Pendleton*, 90 Me. 166, 38 Atl. Rep. 96, 60 Am. St. Rep. 252, the court cited with approval *Lumley v. Guye* and *Bowen v. Hall*. After quoting at length from the latter it said: "The doctrine of those cases has been very generally adopted, and the cases themselves very frequently cited, but the courts of this country"—citing a number of them, and added: "In view of these authorities and others, which it is not necessary to refer to, it must be conceded that for a person to wrongfully, that is, by the employment of unlawful or improper means, induce a third party to break a contract with the plaintiff, whereby injury will naturally and probably, and does in fact, ensue to the plaintiff, is actionable, and the rule applies both upon principle and authority as well to cases where the employer breaks his contract as where it is broken by the employee. In fact, it is not confined to contracts of employment." The court cited *Walker v. Cronin*, *Chipley v. Atkin-*

son, Lucke's case, *Raycroft v. Tayntor*, 68 Vt. 219, 35 Atl. Rep. 53, 33 L. R. A. 225, 54 Am. St. Rep. 882, and others. See, also, *Jones v. Stanly*, 76 N. C. 355.

The English cases have for the most part sustained *Lumley v. Gye*. In *Bowen v. Hall*, supra, Judge Brett and Lord Chancellor Selborne delivered opinions affirming *Lumley v. Gye*, Lord Coleridge, C. J., dissenting. Judge Brett said that the decision of the majority in that case held that "wherever a man does an act which in law and in fact is a wrongful act, and such an act as may, as a natural and probable consequence of it, produce injury to another, and which in the particular case does produce such an injury, an action on the case will lie." And again he said: "Merely to persuade a person to break his contract may not be wrongful in law or fact, as in the second case put by Coleridge, C. J. But if the persuasion be used for the indirect purpose of injuring the plaintiff, or of benefiting the defendant at the expense of the plaintiff it is a malicious act, which is in law and in fact a wrong act, and therefore a wrongful act, and therefore an actionable act if injury ensues from it. We think that it cannot be doubted that a malicious act, such as is above described, is a wrongful act in law and in fact." In *Allan v. Flood* (1898) A. C. 1, a conclusion was reached which is not in accord with Lucke's case, but *Lumley v. Gye* was not overruled, although commented on in the opinion filed. In *Quinn v. Leathem* (1901) A. C. 495, Lord Macnaghten, in referring to *Lumley v. Gye*, said: "Speaking for myself, I have no hesitation in saying that I think the decision was right, not on the ground of malicious intention—that was not, I think, the gist of the action—but on the ground that a violation of legal right committed knowingly is a cause of action, and that it is a violation of legal right to interfere with contractual relations recognized by law if there be no sufficient justification for the interference." Lord Lindley also expressed the same views. In *South Wales Miners' Federation v. Glamorgan Coal Co.* (1905) A. C. 239, it was held that, "procuring a breach of contract is an actionable wrong unless there be justification for interfering with the legal right," and *Lumley v. Gye* was cited with approval by Lord Lindley, while in the other opinions it was not questioned.

It would seem, therefore, that *Lumley v. Gye* has never been overruled in England, but is the leading case on this general subject. It has been adopted or cited with approval in a number of cases in this country, including *Gore v. Condon*. It is not altogether easy to lay down general rules as es-

tablished by the cases, but some principles are quite well settled by them. It may be safely said that, if wrongful or unlawful means are employed to induce the breach of a contract, and injury ensues, the party so causing the breach is liable in an action of tort. While lawful competition must be sustained and encouraged by the law, it is not lawful, in order to procure the benefit for himself, for one to wrongfully force a party to an existing contract to break it, and a threat to do an act which would seriously cripple, if not ruin, such party, unless he does break it, is equivalent to force, as that term is used in this connection. We say "wrongfully" force, because the procurer would not be liable if he had the right to compel the party to break the contract. For example, if the contract between the Knickerbocker Company and the Sumwalt Company prohibited the latter from selling ice to any customer of the former, and the Gardiner Company was a customer within the meaning of the contract, it would not necessarily be wrongful for the Knickerbocker Company to refuse to deliver ice to the Sumwalt Company for the Gardiner Company. In other words, it has the right to protect its own contracts, and merely because its action in that respect would result in the Sumwalt Company not being able to furnish the Gardiner Company would not make the Knickerbocker Company liable to the latter; but if the object of the Knickerbocker Company was merely to procure the trade of the Gardiner Company, and for that purpose threatened to refuse to furnish the Sumwalt Company with ice unless it violated its contract with the Gardiner Company, although there was no contract between the Knickerbocker Company and Sumwalt Company which prohibited the latter from selling to the Gardiner Company, then the Knickerbocker Company would be liable to the Gardiner Company for injury sustained by it for breach of the contract by the Sumwalt Company so procured. That is an illustration by what is meant in the *South Wales' Miners' Federation Case*, supra, where it is said that, "procuring a breach of contract is an actionable wrong, unless there be justification for interfering with the legal right." Again, the mere fact that a party acts from a bad motive or maliciously does not necessarily make him liable. If he has the right to act, his motive in acting cannot of itself make his act wrongful; but if he had no right to procure a breach of contract, and resorts to unlawful means in doing so, he is liable to the injured party. We say "unlawful means," because a party may be the means of causing a contract to be broken,

and still not be liable. To illustrate: A. may advertise his goods for sale at such a low rate as to result in a breach of contract by B., who was under contract with C. to buy at a higher price, but that would not make A. liable to C.; or, to make the illustration more apt, if the Knickerbocker Company had simply refused to furnish the Sumwalt Company with ice, the Gardiner Company would not for that reason alone have a remedy against the Knickerbocker Company. Such action would not necessarily be unlawful or wrongful, but if the Knickerbocker Company refused to furnish the Sumwalt Company if it furnished the Gardiner Company, although it knew it was under contract to do so, in order to get the business of the Gardiner Company for itself on its own terms, then it was unlawful to thus interfere with the contract between the Sumwalt Company and the Gardiner Company. So without further pursuing that branch of the case we are of the opinion that the demurrer was properly overruled, as the declarations stated an actionable wrong, even if there had been no express allegation of malice.

NOTE.—Interference with Contract Relations Other Than That of Master and Servant.—The principal case had escaped our notice until our attention was attracted to it only recently and we recognized the great principle which it formulates with some definiteness for the first time in this country.

Recent years have witnessed the unfolding of old principles of law into wonderful doctrines unknown to the ancients, which not only are intended to fit the exigencies of our present civilization, but are marvelous evidences of the ability of the human mind to extend logically those unchangeable principles of justice which govern the relations of all men in all ages and adjust them to the circumstances of a more and more complex mode of living. In no case is this development more striking than in the progress of the law on the subject matter of this annotation.

No matter what unimportant discoveries may have been made in the Year Books by Lord Justice Coleridge or the author of Brooke's Abridgement who reached different conclusions on the question whether the common law recognized an action for interference with contract relations, we are assured of this fact that in those early centuries there was not the same necessity for the application of this principle as there is to-day, except in the case of the enticement of servants, and there we are perfectly assured by the authorities that there was no uncertain application of the principle that no man has a right to wrongfully interfere with the contractual relations of another. Whether these early author-

ities draw their authority from ancient common law principles or from a statute of laborers passed in the reign of Edward III, it is immaterial to determine because all these early authorities proceeded on the assumption that the interference with contract relations by third persons at least in the case of the enticement of servants, was a common law tort. And it can readily be admitted that the provision in the statute of laborers was merely declaratory of principles already laid down by the common law tribunals.

In the gradual extension of this principle it is not surprising that its growth should be along the line of the relation of master and servant. And there indeed we find the first great and leading expositions of the great doctrine which has now assumed such an important aspect.

Lumley v. Gye, 2 El. and Bl. 216, is indeed the leading case on this question. It is the first great declaration on the subject. That case holds that "an action lies for maliciously procuring a breach of contract to give exclusive personal services for a term certain." As shown by the court in the principal case, this great declaration was not overruled by *Allan v. Flood* or *Quinn v. Leatham*, but only modified by withdrawing the element of "malicious intention" as the "gist of the action." And the ground of the action is stated in the language of Lord Macnaghton, in *Quinn v. Leatham*, to be that the "violation of a legal right committed knowingly is a cause of action, and that it is a violation of legal right to interfere with the contractual relations recognized by law if there be no sufficient justification for the interference." This declaration both widens and contracts the great doctrine here involved. It opens and widens the scope of it by extending the principle to the violation of any legal right and narrows and restricts its operation by suggesting certain circumstances of justification for such interference which we shall not discuss at this time.

And thus we observe the gradual growth of the narrow application of a great principle of law to the case of the enticement of servants into a great doctrine, which, having outgrown its small shell which confined its operation to the relation of master and servant, does now assume to proscribe all meddling interference with the contractual relations of another. The courts were loath to enter upon such a broad uncharted sea and have hesitated as they have lost sight of the old moorings and attorneys whose interest in a particular case have been best served by keeping the old doctrine within its ancient limitations have not hesitated to predict dire consequences if these ancient landmarks were removed and new ones sought to be set. But courts of the ability of the court in the principal case who are competent to blaze a way through the unknown future, are not fearful of the consequences when

assured that they have started from the vantage point of sound principle.

And thus we have the American courts essaying boldly to declare the new doctrine that an interference with any contract relation of another is an actionable wrong and determining in each case the sufficiency of any justification which may be pleaded. *Angle v. Railroad*, 151 U. S. 1; *Jones v. Stanly*, 76 N. Car. 356; *Morgan v. Andrews*, 107 Mich. 33; *Louisville, etc. R. R. v. McConnell*, 82 Fed. Rep. 65; *Jackson v. Stanfield*, 137 Ind. 592. Lawyers will find all these decisions very interesting as offering valuable suggestions for future litigation for which the authorities at the present time offer no precedent.

JETSAM AND FLOTSAM.

TYPEWRITTEN WILLS.

The practice of typewriting wills was recently condemned by the surrogate of King's County, because of the ease of alteration. In the *New York Law Journal* a correspondent suggested that the following simple precautions would obviate these objections:

"(1) Have the testator sign at bottom of each page.

"(2) Have the typewriting free of erasures or interlineations, with all blank space ruled off.

"(3) Recite in the Intestimonium clause the facts.

"(a) That the will is contained on so many sheets of paper.

"(b) That the testator has subscribed his name at the bottom of each sheet thereof, and 'to this, the last sheet thereof, he has hereto subscribed his name and affixed his seal,' etc.

"While no seal is necessary, and but two witnesses are required in this state, by adding the seal and a third witness a will thus executed is probatable in every state of the Union.

"It is my uniform custom to have all wills executed in this manner, so as to provide against local intestacy consequent upon a testator becoming afterwards seized of real property in a state foreign to his domicile or to the place where the will is executed."

A still simpler precaution, and one which will prove most efficacious, is to make a letter press copy of the original typewritten sheets. After the sheets have once been wet and dried they are at least as difficult to alter as hand-writing.—*Green Bag*.

HUMOR OF THE LAW.

Judge—What have you to say as to the charge that, while the husband of one woman, you married three others?"

Bigamist—Simply this: that having four of a kind isn't what it is cracked up to be.

The lawyer was doing a cross-examining stunt.

"Now, sir," he said to the witness, "tell the

court how far you were from the accused when he fired the shot."

"Thirteen feet, seven and three-quarters inches," answered the witness.

"Oh, come now," said the lawyer, "how can you tell to the fraction of an inch?"

"I knew some fool would ask me," replied the other, "so I measured it."—*Exchange*.

WEEKLY DIGEST.

Weekly Digest of All the Current Opinions of All the State and Territorial Courts of Last Report, and of all the Federal Courts.

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1. **Accident Insurance**—Payment of Premiums.—Where it does not appear that an accident insurance association had authorized remittances of dues by mail, payment is not made when the letter containing the remittance is deposited in the post office.—*Travelers' Protective Ass'n. of America v. Roth*, Tex., 108 S. W. Rep. 1039.

2. **Accord and Satisfaction**—Part Payment.—A settlement of an unsecured debt by merging it in a secured obligation for a smaller amount is based on a consideration and is enforceable.—*In re Black Diamond Copper Min. Co.*, Ariz., 95 Pac. Rep. 117.

3. **Animals**—Quarantine.—The power conferred by statute on sheep inspectors to quarantine sheep infected with or which have been exposed to infectious diseases is not inhibited by the Constitution, since it is practically the only method by which the state can enforce its

police regulations.—*Richter v. State*, Wyo., 95 Pac. Rep. 51.

4. **Appeal and Error**—Assignment of Error.—An assignment of error that "the court erred in rendering judgment for plaintiff in said cause" is too general to be considered.—*Stearns & Culver Lumber Co. v. Adams*, Fla., 45 So. Rep. 847.

5. **Findings of Fact**.—In the absence of a special finding of facts or request therefor in an action tried to the court, the answer on a writ of error is limited to the sufficiency of the petition and rulings on questions of law during the trial, if any have been preserved.—*Hayden v. Ogden Sav. Bank*, U. S. C. C. of App., Eighth Circuit, 158 Fed. Rep. 90.

6. **Law of the Case**.—The rule known as "the law of the case" cannot be invoked except as to questions actually considered and determined in the first appeal, and in its application cognizance will be taken of such points only as appear to have been decided in the former appeal.—*Alderding v. Allison, Ind.*, 83 N. E. Rep. 1006.

7. **Proceedings Below**.—A judgment entered in the lower court after reversal in conformity with the opinion of the appellate court must be considered in connection with the opinion.—*Taylor v. Taylor*, Ky., 108 S. W. Rep. 243.

8. **Record on Appeal**.—Where the contract sued on is not incorporated in the record on appeal, the court will not determine whether the proper measure of damages was applied by the trial court.—*Cowart v. Walter Connolly & Co.*, Tex., 108 S. W. Rep. 973.

9. **Rehearing**.—Where a mandate on appeal directed the lower court to find relief for appellants on their cross-complaint and it appears that the cross complaint does not entitle them to such relief, the mandate will be modified on petition for rehearing and the petition overruled.—*Small v. Binford, Ind.*, 84 N. E. Rep. 19.

10. **Reservation of Grounds for Review**.—Errors relating to matters of exception occurring on the trial and not appearing on the record proper held not reviewable on appeal, in the absence of a motion for new trial filed within the statutory period.—*Cantwell's Adm'x. v. City of Cassville*, Mo., 108 S. W. Rep. 1084.

11. **Sufficiency of Statement**.—Where it does not appear from the statements in the brief that a certain defense was raised by the evidence, there is no error in refusing to charge such defense.—*Hirsch v. Patton*, Tex., 108 S. W. Rep. 1015.

12. **Transcript**.—A transcript not allowed to remain in the lower court for 20 days after service of notice upon opposite party that it has been filed, as required by Laws 1907, p. 124, c. 74, sec. 15, will be stricken from the files of the supreme court.—*City of Bisbee v. Hargrove*, Ariz., 94 Pac. Rep. 1112.

13. **Assault and Battery**—Instruction.—In an action for an assault, an instruction held not objectionable as authorizing a recovery, even though defendant did not strike plaintiff.—*Burley v. Menefee*, Mo., 108 S. W. Rep. 120.

14. **Assignments for Benefit of Creditors**—Management and Estate.—An assignee for the benefit of creditors held bound to exercise the care that an ordinarily prudent person would use in his own affairs.—*Cominger v. Louisville Trust Co.*, Ky., 108 S. W. Rep. 950.

15. **Bankruptcy**—Acknowledgment.—A foreign assignment by a bankrupt, though volun-

tarily executed, will not operate to convey real estate in Arizona, where it was not acknowledged as provided by the Arizona statute for the acknowledgment of deeds.—*In re Delehanty's Estate*, Ariz., 95 Pac. Rep. 109.

16. **Compositions**.—The bankruptcy law does not provide that compositions, though informal, or preferences, shall be void as between the parties.—*In re Black Diamond Copper Min. Co.*, Ariz., 95 Pac. Rep. 117.

17. **Corporations**.—Where a nonresident stockholder of a bankrupt corporation was claimed to have knowledge of the fraudulent overvaluation of the assets for which the corporation's stock was issued, its trustee in bankruptcy could not compel her to answer in the bankruptcy proceedings on an order to show cause, delivered by mail and by publication.—*In re Haley*, U. S. C. C. of App., Sixth Circuit, 158 Fed. Rep. 74.

18. **Foreign Assignment**.—A foreign assignment by a bankrupt, though voluntarily executed, will not operate to convey real estate in Arizona, where it was not acknowledged as provided by the Arizona statute for the acknowledgment of deeds.—*In re Delehanty's Estate*, Ariz., 95 Pac. Rep. 109.

19. **Fraudulent Transfers**.—An individual bankrupt's estate having been fraudulently conveyed to certain persons who thereupon created a corporation, which thereafter became a bankrupt, the corporation's assets held not payable to the individual bankrupt's trustee, nor were the latter's creditors entitled to file their claims against the corporation's estate in bankruptcy.—*In re L. M. Alleman Hardware Co.*, U. S. D. C. M. D. Pa., 158 Fed. Rep. 119.

20. **Insurance by Receiver**.—Insurance on personal property taken out by a receiver, if paid for by him, is a proper subject of credit in his accounts; but not, if left to be taken care of by the trustee, as a matter inuring to the benefit of the estate.—*In re Kyte*, U. S. D. C. M. D. Pa., 158 Fed. Rep. 121.

21. **Partnership**.—Under 14 Del. Laws, p. 652, c. 562, sec. 1, held, that two members of a bankrupt firm having their domicile in Delaware were entitled to exemptions of all wearing apparel in accordance with such law.—*In re H. L. Evans & Co.*, U. S. D. C., D. Del., 158 Fed. Rep. 153.

22. **Preferences**.—Payments to certain creditors by an insolvent corporation held, under the evidence, to have been made with intent to prefer such creditors, and to constitute acts of bankruptcy.—*John Naylor & Co. v. Christiansen Harness Mfg. Co.*, U. S. C. C. of App., Sixth Circuit, 158 Fed. Rep. 290.

23. **Seizure in Replevin**.—Bankr. Act July 1, 1898, c. 541, Sec. 67f, 30 Stat. 565 (U. S. Comp. St. 1901, p. 2450), held sufficiently broad to vacate a seizure under a replevin writ against a bankrupt on the day prior to the filing of a bankruptcy petition against him and the appointment of a temporary receiver of his property.—*In re Rudnick & Co.*, U. S. D. C., S. D. N. Y., 158 Fed. Rep. 223.

24. **Subrogation**.—An assignee of a judgment and execution held entitled to subrogation to the rights of the judgment creditor, and entitled to reimbursement out of the proceeds of the bankrupt judgment debtor's property for the amount advanced to secure such assignment, as against the bankrupt's trustee and general creditors.—*In re Bruce*, U. S. D. C., N. D. N. Y., 158 Fed. Rep. 123.

25.—**Suit by Trustee.**—A petition by a trustee in bankruptcy to compel the bankrupt's assignee for the benefit of creditors to settle his account held complete without certain allegations.—*Comingor v. Louisville Trust Co., Ky.*, 108 S. W. Rep. 950.

26. **Benefit Societies**—Agents of Insured.—The stipulation in a mutual benefit insurance policy that the local secretary should be the agent of insured in the remittance of past due premiums held invalid as requiring inconsistent duties.—*United States Benev. Soc. v. Watson, Ind.*, 84 N. E. Rep. 29.

27. **Bigamy**—Powers of Government.—The framers of the constitution in employing the words, "bigamous, polygamous plural, celestial and patriarchal marriages, intended to prohibit a man having more than one wife at any one time, under whatever name he may choose to style his marriage.—*Toncray v. Budge, Idaho*, 95 Pac. Rep. 26.

28. **Bills and Notes**—Non-negotiable Notes.—A recital in a note that the title to the property for which it is given shall remain in the payee, and he shall have the right to take possession when he deems himself insecure, renders such instrument non-negotiable under *Sess. Laws 1903*, pp. 380, 381, Secs. 1, 5.—*Kimpton v. Studebaker Bros. Co., Idaho*, 94 Pac. Rep. 1039.

29.—**Purchasers for Value.**—A bank discounting a note and crediting the amount thereof on the indorser's account without paying to him any value, is not a bona fide purchaser for value.—*Elgin City Banking Co. v. Hall, Tenn.*, 108 S. W. Rep. 1068.

30. **Bonds**—Allegations as to Seal.—An averment that the individual seals of township commissioners on railroad aid bonds sued on would have had no legal efficacy held an averment of a conclusion, not affecting the force of an allegation that the bonds were executed under the seals of the commissioners.—*Smythe v. Inhabitants of New Providence Tp., U. S. C. C., D. N. Jer.*, 158 Fed. Rep. 213.

31. **Boundaries**—Estoppel.—A person allowing another to build partly on his homestead held not estopped to assert his true boundary.—*Werkheiser v. Foard, Tex.*, 108 S. W. Rep. 983.

32. **Cancellation of Instruments**—Mistake.—A written contract deliberately entered into and intelligently made will not be set aside, except on satisfactory proof of mistake.—*Kennedy v. Fulton Mercantile Co., Ky.*, 108 S. W. Rep. 948.

33. **Carriers**—Charges.—When a freight rate has been fixed and posted and published as required by the interstate commerce act, such rate must prevail over an agreement fixing a different rate.—*Fisher v. Great Northern Ry. Co., Wash.*, 95 Pac. Rep. 77.

34.—**Concurrent Negligence.**—Where passengers on a street car are injured by the concurrent negligence of the street car company and another railroad company, they can sue the two companies jointly.—*Lindenbaum v. New York, N. H. & H. R. Co., Mass.*, 84 N. E. Rep. 129.

35.—**Injury to Alighting Passenger.**—If a street car conductor knew or had reason to believe that plaintiff was about to alight, and with such knowledge permitted the car to be started so as to cause plaintiff to be thrown down and injured, the company is liable for the injury if plaintiff was free from fault.—*El Paso Electric Ry. Co. v. Boer, Tex.*, 108 S. W. Rep. 199.

36.—**Instructions in Personal Injury.**—In an action against a carrier for injuries to a passenger, an instruction authorizing a verdict for defendant if the injury to plaintiff was the result of an accident held properly refused.—*Skiles v. St. Louis, I. M. & S. Ry. Co., Mo.*, 108 S. W. Rep. 1082.

37.—**Loss of Goods.**—Where a consignee of goods shipped over defendant's line called for them, and was told that they were there, but could not be delivered to him until the next day and were destroyed by fire that night, defendant's liability was that of a carrier.—*Fisher v. Northern Pac. Ry. Co., Wash.*, 94 Pac. Rep. 1073.

38.—**Negligence.**—Evidence of plaintiff in an action for injuries due to a caboose on which he was a passenger being struck by an engine held not to raise the question of contributory negligence so as to impose on him the duty to remove the suspicion of his own negligence.—*Herring v. Galveston, H. & S. A. Ry. Co., Tex.*, 108 S. W. Rep. 977.

39.—**Obligation toward Trespasser.**—A carrier is bound to accord to a trespasser on a train humane treatment, and cannot inflict brute violence on him or employ more force than is needed to eject him, and ejecting him under circumstances indicative of inhumanity or reckless disregard of life may entitle him to an action.—*Beck v. Quincy, O. & K. C. R. Co., Mo.*, 108 S. W. Rep. 132.

40.—**Pleadings in Negligence Action.**—Where plaintiff in an action against a railroad for injuries pleads that the rails had not been properly spiked to the ties and the ground properly tamped, he cannot recover on other grounds.—*Norton v. Galveston, H. & S. A. Ry. Co., Tex.*, 108 S. W. Rep. 1044.

41. **Commerce**—Regulations.—A contract through rate on canned goods involving ocean transportation less than the railroad carrier's posted rate held not unlawful, in the absence of evidence that the conditions attending ocean competition did not justify the lesser rate.—*Fisher v. Great Northern Ry. Co., Wash.*, 95 Pac. Rep. 77.

42.—**Regulation of Telegraph Companies.**—Pub. Acts 1893, p. 312, No. 195, sec. 1, making a telegraph company liable for negligence to the amount of loss sustained, held only to apply when a company asks to be discharged because of a contract limiting liability to the amount received for sending, and to apply the act to an interstate message, is not to give the act extra-territorial effect.—*Commercial Milling Co. v. Western Union Telegraph Co., Mich.*, 115 N. W. Rep. 698.

43.—**State Regulation.**—The legislature may make such reasonable rules governing its domestic commerce as seem best fitted for the interest of its citizens, provided such regulations do not burden or interfere with the interstate commerce of the nation.—*State v. Missouri Pac. Ry. Co., Neb.*, 115 N. W. Rep. 614.

44. **Constitutional Law**—Class Legislation.—The provision of House Enrolled Bill No. 418 of 1907 (Loc. Laws 1907, p. 981, No. 684), establishing a juvenile court, which excepts from its operation children who are inmates of other charitable or semicharitable institutions subject to the visitatorial powers of the board of corrections and charities, is not void as class legislation.—*Robison v. Wayne Circuit Judges, Mich.*, 115 N. W. Rep. 682.

45.—**Construction.**—The interpretation giv-

en to a constitution by the first legislative body which acts thereunder is a contemporary construction to be treated with great deference.—*McPhee & McGinnity Co. v. Union Pac. R. Co.*, U. S. C. C. of App., Eighth Circuit, 158 Fed. Rep. 5.

46.—**Powers of Government.**—It is competent for the legislature to authorize the contesting of elections, and to prescribe the manner and method of conducting the same, and to establish or designate the court or tribunal before which such contest shall take place.—*Toneray v. Budge*, Idaho, 95 Pac. Rep. 26.

47.—**Territorial Legislature.**—The legislature of a territory is on the same footing as a state legislature so far as regards its power to delegate legislative power to the people; neither one having such power in the absence of express provision therefor.—*Thalheimer v. Board of Supr's of Maricopa County*, Ariz., 94 Pac. Rep. 1129.

48.—**Vested Rights.**—A stockholder in a foreign corporation held not to have a vested immunity from liability upon his unbarred statutory obligation as a stockholder because of delay in its enforcement pending the enactment of laws in the state of the corporation's domicile to enable the enforcement thereof against foreign stockholders.—*Converse v. Ayer*, Mass., 84 N. E. Rep. 98.

49.—**Contracts.**—Construction. — The determination of whether there was but one modified contract or distinct contracts depends primarily on the intent of the parties.—*Mulcahy v. Deudonne*, Minn., 115 N. W. Rep. 636.

50.—**Department Store Space.**—A letter written by a licensor to the licensee of space in a department store relative to the latter's breach of the contract held not a notice of rescission, but of the licensor's election to treat the contract as terminated, and to recover damages for the breach.—*R. H. White Co. v. Jerome H. Remick & Co.*, Mass., 84 N. E. Rep. 113.

51.—**Performance.**—The necessity for the production of a certificate of approval by the architect as a condition precedent to an action on the contract held dispensed with, the refusal being unreasonable.—*Coplew v. Durand*, Cal., 95 Pac. Rep. 38.

52.—**Time for Performance.**—A building contract not providing when it is to be performed on the contractor's bond, given, he is entitled to a reasonable time.—*Clark v. Gulesian*, Mass., 84 N. E. Rep. 94.

53.—**What Law Governs.**—In an action to recover an assessment levied upon defendant as a stockholder, in a foreign corporation, his liability will be determined by the laws of the domicile of such corporation.—*Converse v. Ayer*, Mass., 84 N. E. Rep. 98.

54.—**Corporations.**—Contracts.—A corporation can act only through its agents, and, when it is sought to hold a corporation liable on a contract alleged to have been made by an agent the name of the agent should be stated in the petition.—*Gulf & I. Ry. Co. of Texas v. Campbell*, Tex., 108 S. W. Rep. 972.

55.—**Liability as Partners.**—Where defendant signed a contract with plaintiff in the name of a proposed corporation, and the corporation was not thereafter organized, they became liable upon the contract as partners.—*Kennedy v. Fulton Mercantile Co.*, Ky., 108 S. W. Rep. 948.

56.—**Liability to Assessment.**—A director of a corporation who voted as such for the levying of an assessment on the capital stock is

estopped to object to irregularities in the assessment, and the estoppel binds the assignee of his interests.—*Campbell v. Santa Maria Oil & Gas Co.*, Cal., 95 Pac. Rep. 39.

57.—**Members.**—It is in general essential to the validity of acts done at a special or called meeting of a corporation that the call shall be made by the persons appointed by the governing statute to call such meetings, and notice must be given at the time and in the manner prescribed.—*Riggs v. Polk County*, Or., 95 Pac. Rep. 5.

58.—**Sale of Franchise.**—A quasi public corporation possessing a public franchise held without power to sell its property and franchise without legislative authority therefor.—*Weid v. Gas & Electric Light Comr's.*, Mass., 84 N. E. Rep. 101.

59.—**Ultra Vires Acts.**—A corporation organized under Gen. St. c. 56, cannot, after receiving the benefits of a purchase, plead that its act was ultra vires, in bar of payment of the price.—*Albin Co. v. Commonwealth*, Ky., 108 S. W. Rep. 299.

60.—**Counties.**—Taxation.—Under Const. sec. 157, limiting the tax rate for counties, the levy in excess of the legal limit is void, and neither the county nor the collector nor his deputies has any right to the excess collected, but it belongs to the taxpayers.—*Boone v. Powell County*, Ky., 108 S. W. Rep. 251.

61.—**Courts.**—Statutes of Other States.—In an action in Massachusetts against a stockholder in a Minnesota corporation, a judicial construction by the courts of that state of Minn. Const. art. 10, sec. 3, imposing certain liabilities on stockholders, held conclusive.—*Converse v. Ayer*, Mass., 84 N. E. Rep. 98.

62.—**Creditor's Suit.**—Pleading.—An action authorized by Civ. Code Prac. sec. 439, to subject property to the satisfaction of a judgment, cannot be maintained unless it affirmatively appears from the petition that plaintiff has a judgment as well as an execution.—*Morrison v. Fletcher*, Ky., 108 S. W. Rep. 267.

63.—**Criminal Evidence.**—*Res Gestae.*—Where the victim of an assault is of an age to render it improbable that his statement with respect thereto was deliberate and its effect premeditated, it is not required that such statement to be admissible as evidence shall have been so nearly contemporaneous with the event as in case of an older person.—*Soto v. Territory*, Ariz., 94 Pac. Rep. 1104.

64.—**Criminal Law.**—Admissions. — Accused having admitted that he was a wholesale liquor dealer, and not having objected at the trial to the introduction of parol evidence of such fact, he could not object on a writ of error that the court should have required proof thereof by the revenue collector's certificate.—*Williams v. United States*, U. S. C. C. of App., Eighth Circuit, 158 Fed. Rep. 30.

65.—**Appeal.**—Attorneys held to be presumed to know the procedure necessary to secure an extension of time preparing a bill of exceptions, and where they fail to observe it, their misunderstanding or misconstruction of the statute cannot excuse their default.—*People v. Simmons*, Cal., 95 Pac. Rep. 48.

66.—**Questions for Review.**—*Burns' Ann. St.* 1908, sec. 2345, making the carrying of concealed deadly weapons an offense not being in conflict with Const. sec. 32, giving the people the right to bear arms, the question whether, if construed as applying to a peace officer, it

is constitutional, will not be considered, where it is not presented by the record.—*McIntire v. State, Ind.*, 83 N. E. Rep. 1005.

67. **Criminal Trial**—Argument of Counsel.—Where, in a criminal prosecution, defendant objected to remarks of the prosecuting attorney in his argument, and no exception was taken that the judge's rebuke to the attorney was insufficient, the point will be waived.—*State v. Baker, Mo.*, 108 S. W. Rep. 6.

68. **Continuance**.—The granting or refusing a continuance is matter so largely resting in the discretion of the trial court that the supreme court will not interfere unless such discretion has been unwisely exercised.—*State v. Horn, Mo.*, 108 S. W. Rep. 3.

69. **Interpreters**.—Where no exception was taken to permitting an interpreter to act before or at the time he so acted or the matter called to the attention of the court on motion for new trial, the court of appeals will not consider it.—*Nioum v. Commonwealth, Ky.*, 108 S. W. Rep. 945.

70. **Newly Discovered Evidence**.—A new trial for newly discovered evidence held properly denied, where it was not of such a character as would probably have a preponderating influence on another trial.—*Nioum v. Commonwealth, Ky.*, 108 S. W. Rep. 945.

71. **Prejudicial Error**.—To permit a witness to testify that there had been an indictment against accused and that there was a record of conviction, held error.—*People v. Jones, N. Y.*, 84 N. E. Rep. 61.

72. **Damages**—Breach of Contract.—In an action for breach of a contract for the letting of space in a department store, the licensor held entitled to recover the loss of rentals for the remainder of the contract term after having used reasonable diligence to use the space abandoned to decrease the damages.—*R. H. White Co. v. Jerome H. Remick & Co., Mass.*, 84 N. E. Rep. 113.

73. **Contract to Deliver Bonds**.—The measure of damages for breach of a contract to deliver bonds of a corporation, the consideration for which has been paid, is the value of the bonds at the time they should have been delivered under the contract with interest, and such value is *prima facie* their face value.—*Henry v. North American Ry. Const. Co., U. S. C. C. of App., Eighth Circuit*, 158 Fed. Rep. 79.

74. **Exemplary Damages**.—At common law, what are called exemplary, punitive, or vindictive damages, where the injury has been wanton, malicious, gross, or outrageous, may be awarded by the jury.—*Jaeger v. Metcalf, Ariz.*, 94 Pac. Rep. 1094.

75. **Descent and Distribution**—Conveyance.—Under Rev. St. 1901, par. 1904, the probate court had no power to assign to the assignees of a bankrupt heir the bankrupt's share in a decedent's real estate, where such assignees had not a valid conveyance from the heirs sufficient to pass title to land in Arizona.—*In re Delehanty's Estate, Ariz.*, 95 Pac. Rep. 109.

76. **Dismissal and Nonsuit**—Directing Verdict.—Defendant held entitled to move for dismissal of action, though no demurrer had been filed or request made to direct a verdict, where the court had no jurisdiction because of the death of the wrongdoer.—*Hey v. Prime, Mass.*, 84 N. E. Rep. 141.

77. **Divorce**—Sufficiency of Evidence. — A complaint in divorce that plaintiff's wife habitu-

ally and systematically pursued a course of personal indignities towards him, which rendered his condition intolerable, held sustained by the evidence.—*Wann v. Wann, Ark.*, 108 S. W. Rep. 1052.

78. **Dower**—Estoppel.—Where land was purchased from a husband on his wife's assurance that she and her husband had settled their property rights and that she had no further interest in such land, she was estopped from thereafter claiming dower therein.—*Morgan v. Sparks, Ky.*, 108 S. W. Rep. 233.

79. **Ejectment**—Identification of Property.—Where the description in the deeds under which plaintiff claimed corresponded with the description in the declaration, plaintiffs were not bound to introduce a plat of the city subdivision containing the lots to identify the premises.—*Glanz v. Zlabek, Ill.*, 84 N. E. Rep. 36.

80. **Elections** — Contests. — That a man belongs to a church that teaches marriage ceremonies remain in force during this life and all eternity does not disqualify him for an elector, so long as such church does not teach more than one of such marriages for the same person during the same period of time.—*Toncray v. Budge, Idaho*, 95 Pac. Rep. 26.

81. **Police Power**.—The nomination of party candidates for public office concerns the public welfare, and the legislature in the exercise of the police power may make reasonable regulations thereof.—*State v. Fulton, Ohio*, 84 N. E. Rep. 85.

82. **Eminent Domain**—Collateral Attack.—Where the condemnation judgment in proceedings for the widening and changing the grade of streets is without jurisdiction, the judgment may be collaterally attacked in proceedings to affirm an assessment for the cost of the improvement.—*In re City of Seattle, Wash.*, 94 Pac. Rep. 1075.

83. **Compensation**.—The constitutional provision that private property shall not be taken for public use without compensation does not apply to property held by a governmental subdivision for public use.—*American Steel Dredge Works v. Board of Com'rs. of Putnam County, Ind.*, 84 N. E. Rep. 19.

84. **Compensation**.—Where a husband and wife have an estate by the entirety in real estate, the wife has a substantial and recognized interest in the inheritance which must be paid for before it can be taken or damaged for public purposes.—*Holmes v. Kansas City, Mo.*, 108 S. W. Rep. 9.

85. **Easements**.—The operation and length of trains by an elevated railroad assenting and exercising a right to operate an elevated track held not substantial elements of the right.—*Bremer v. Manhattan Ry. Co., N. Y.*, 84 N. E. Rep. 59.

86. **Equity**—Additional Findings.—Where a reference is made to a master and the master reports findings of fact, the court may make additional findings of fact from the report without hearing further evidence.—*American Circular Loom Co. v. Wilson, Mass.*, 84 N. E. Rep. 133.

87. **Final Decree**.—Where the court finds that plaintiff is entitled to an assignment of certain letters patent, it should find the amount to be paid therefor by plaintiff, thus giving it an option, whether to take the patents at the price found.—*American Circular Loom Co. v. Wilson, Mass.*, 84 N. E. Rep. 133.

88. **Evidence—Copy of Deed.**—Where the certified copy of a deed acknowledged before a mayor recited that it bears the mayor's official seal, it will be presumed that the omission of the "(L. S.)" in the copy was the mistake of the recorder making the copy.—Hubbard v. Swofford Bros. Dry Goods Co., Mo., 108 S. W. Rep. 15.

89. **Delay in Transporting Cattle.**—In an action to recover for defendant's negligent delay in transporting cattle, witnesses held qualified to state the usual time of transportation between the point of shipment and the market.—St. Louis I. M. & S. Ry. Co. v. Boshear, Tex., 108 S. W. Rep. 1032.

90. **Expert Testimony.**—A statement of an expert witness that he believes he is capable of expressing an opinion on the matter in issue is a sufficient expression of his opinion as to his own competency.—El Paso & S. W. Ry. Co. v. Smith, Tex., 108 S. W. Rep. 988.

91. **Recitals in Deeds.**—Ordinarily recitals of extraneous facts in a deed are not evidence of the facts stated as against strangers, though binding on the parties and their privies.—Dennis Bros. v. Strunk, Ky., 108 S. W. Rep. 957.

92. **Exceptions, Bill of—Number of Bills.**—Where appellant defendant presented one bill of exceptions, and subsequently plaintiff presented another bill of exceptions, both of which the court signed and made part of the record, they will be treated as supplementary to each other.—United States Benev. Soc. v. Watson, Ind., 84 N. E. Rep. 29.

93. **Executors and Administrators—Suit to Try Title.**—In a suit to try title between grantees of a woman's heirs and grantees of her administrator, a certificate granted by the board of land commissioners held a part of her estate, and subject to administration, and not a donation to her heirs.—Fields v. Burnett, Tex., 108 S. W. Rep. 1048.

94. **Fines—Power of Court to Remit.**—Where a person has been adjudged guilty of contempt by a federal court for willful violation of an injunction order entered in a suit to which he was not a party and a fine has been imposed as a punishment and paid, such fine goes to the United States, and the court, at least after the term has passed, has no jurisdiction to remit the same.—Butte & Boston Consol. Min. Co. v. Montana Ore Purchasing Co., U. S. C. C., D. Mont., 158 Fed. Rep. 131.

95. **Fire Insurance—Powers of Agent.**—To recover for a loss under a policy, by the terms of which liability thereon was suspended for nonpayment of a premium note, on the ground that an agent had continued the policy in force, the agent's authority so to continue the policy must be shown.—American Ins. Co. v. Hornbarger & Harris, Ark., 108 S. W. Rep. 213.

96. **Forgery—Uttering Forged Note.**—In a prosecution for uttering a forged note, the fact that defendant forged the instrument need not be established, but the charge is sustained by proof of an uttering.—State v. Fisk, Ind., 83 N. E. Rep. 995.

97. **Fraud—Pleading.**—The mere characterization of an act in a pleading as having been done "with intent to defraud the plaintiff" does not charge fraud.—Gill v. Manhattan Life Ins. Co., Ariz., 95 Pac. Rep. 89.

98. **Frauds, Statute of—Parol Gift of Land.**—A parol gift of land accompanied by possession

and improvements held valid in equity, notwithstanding the statute of frauds.—Hammond v. Hammond, Tex., 108 S. W. Rep. 1024.

99. **Part Performance.**—The statute of frauds will not invalidate an oral contract for the sale of an interest in land which has been executed by the delivery and acceptance of the deed, where nothing remains to be done but the payment of money; but, if anything else remains to be done, the statute does apply.—Rogan v. Arnold, Ill., 84 N. E. Rep. 58.

100. **Guaranty—Bills and Notes.**—Whether a guaranty of a note stipulates that the maker will pay or whether it stipulates that the guarantor will pay, the undertaking is absolute, whether the maker is solvent or not, and the guarantor may pay or see that it is paid.—Elgin City Banking Co. v. Hall, Tenn., 108 S. W. Rep. 1068.

101. **Habeas Corpus—Hearing.**—Where a person in custody alleges in his petition for writ of habeas corpus that another court has made an order granting him bail, and the evidence shows no such order ever entered of record, there is a failure to establish such order and the application should be denied.—Ex parte Stevenson, Okl., 94 Pac. Rep. 1071.

102. **Homicide—Indictment.**—An indictment for homicide is not fatally defective because it fails to allege the means or instrument by which the wound was inflicted, or the nature of such wound.—Molina v. Territory, Ariz., 95 Pac. Rep. 102.

103. **Self-Defense.**—Where one kills an officer attempting to arrest him without a warrant, and there is nothing from which the official character of the officer can be inferred, the offence is manslaughter.—Hurd v. State, Tenn., 108 S. W. Rep. 1064.

104. **Husband and Wife—Community Property.**—A woman marrying in good faith a man having a wife held entitled to her community interest in property acquired by him subsequent to the marriage.—Hammond v. Hammond, Tex., 108 S. W. Rep. 1024.

105. **Estate by Entirety.**—Where a husband and wife have an estate by the entirety in land, the wife may sue for the possession thereof as against all persons except the husband.—Holmes v. Kansas City, Mo., 108 S. W. Rep. 9.

106. **Property of Wife.**—The common-law rule that property purchased with the earnings of a wife and children belonging to the husband held inapplicable in a proceeding to set aside exemptions to the husband in bankruptcy from other property.—In re Diamond, U. S. D. C., N. D. Ala., 158 Fed. Rep. 370.

107. **Separate Maintenance.**—It was a question for the legislature to declare under what conditions it should accord the right to a married woman to maintain an action for separate maintenance.—Hiner v. Hiner, Cal., 94 Pac. Rep. 1044.

108. **Indictment and Information—Indorsement of Names of Witnesses.**—Objection that the names of some of the witnesses were not indorsed on the indictment held too late when made after final judgment.—State v. Long, Mo., 108 S. W. Rep. 35.

109. **Incest—Indictment.**—The allegation that the crime of adultery and fornication has been committed may be regarded as surplusage not affecting the sufficiency of the facts alleged to charge incest.—McCaskill v. State, Fla., 45 So. Rep. 843.

110. **Interstate Commerce — Police Power.**—Transportation of goods from another state into New Jersey, and delivery in the original packages to the purchasers in that state under a contract of sale, cannot be interfered with by the state or any of its municipalities, except for police purposes.—*Simpson-Crawford Co. v. Borough of Atlantic Highlands*, U. S. C. C. 158 Fed. Rep. 372.

111. **Limitation of Actions—Commencement of Action.**—Where the service of process in an action is quashed, plaintiff may cause the issuance and service of another summons in the same action on the petition previously filed, or an amended petition, and commence the action anew within Rev. St. 1899, sec. 3461.—*Clause v. Columbia Savings & Loan Assn.*, Wyo., 95 Pac. Rep. 54.

112. **Mines and Minerals—Notice of Claims.**—The object of the law in requiring the location of mining claims to be made with reference to some natural object or permanent monument is to direct attention to the locality in which the claim can be found.—*Blismark Mountain Gold Min. Co. v. North Sunbeam Gold Co.*, Idaho, 95 Pac. Rep. 14.

113. **Mortgages—Assumption by Purchaser.**—A general assumption clause in a deed held not to constitute such a contract as to make the case an exception to the general rule that a mortgagee foreclosing against a subsequent grantee maintains his action on the doctrine of subrogation.—*Sherman v. Goodwin*, Ariz., 95 Pac. Rep. 121.

114. **Payment of Debt.**—Where land is conveyed subject to a mortgage and the grantee pays it will extinguish the debt, although he has an assignment made to another.—*Lydon v. Campbell*, Mass., 84 N. E. Rep. 305.

115. **Municipal Corporations—Street Improvements.**—A contract for street improvements according to specifications, one of which required that all loss or damage arising from the nature of the work to be done should be sustained by the contractor, was void.—*Glassell v. O'Dea*, Cal., 95 Pac. Rep. 44.

116. **Partnership—Liability of Partner.**—Where a person with his consent has been held out as a partner, liability as such is fastened on him; and an unauthorized holding out will have this effect as a result of a subsequent ratification.—*Melnhard, Schaul & Co. v. Bedingfield Mercantile Co.*, Ga., 61 S. E. Rep. 34.

117. **Realty.**—Where a partnership dissolution agreement provided for the payment of partnership debts and adjustment of the rights of partners in the firm assets, held a conversion of partnership real estate into personalty is to be regarded as having been effected.—*Rosenbaum v. City of New York*, 109 N. Y. Supp. 775.

118. **Patents—Assignments.**—A resolution of corporate stockholders and a formal assignment in accordance therewith held to pass its equitable interest in letters patent to an invention useful in its business but purchased by its president for himself.—*American Circular Loom Co. v. Wilson*, Mass., 84 N. E. Rep. 133.

119. **Payment—Presumptions.**—Where the presumption of payment of a debt arising by the debtor's executing his note either to the creditor or to a third person deprives the party accepting the note of a collateral security or some other substantial benefit such circumstance rebuts the presumption.—*Beach v. Huntsman*, Ind., 83 N. E. Rep. 1033.

120. **Replevin.**—In an action to replevy

horses purchased by plaintiff from defendant's intestate, which plaintiff claimed had been paid for by canceling a debt due him from intestate, evidence of a check drawn by plaintiff in favor of intestate's grandson held admissible as corroborating plaintiff's testimony.—*Cobb v. Holloway*, Mo., 108 S. W. Rep. 109.

121. **Principal and Agent—Authority of Agent.**—Held, that an express company was liable for the act of an agent in settling a loss in excess of his authority, where his agency was not brought to the attention of the claimant who supposed he was acting as principal.—*Brooks v. Shaw*, Mass., 84 N. E. Rep. 110.

122. **Liability of Principal.**—A manufacturer selling through an agent an alcoholic beverage held liable for the agent's representations that the beverage was nonalcoholic.—*Huynor Mfg. Co. v. Davis*, N. C., 61 S. E. Rep. 54.

123. **Process—Defects.**—The irregularity or imperfection of a summons or a service thereof which will deprive the court of jurisdiction must render the summons or the service so defective that it will authorize a collateral impeachment of the judgment rendered thereon.—*Clause v. Columbia Savings & Loan Assn.*, Wyo., 95 Pac. Rep. 54.

124. **Railroads—Accident at Crossing.**—A traveler approaching a railroad crossing and the employees in charge of an approaching train held required to exercise the same vigilance to avoid accidents.—*Lake Shore & M. S. Ry. Co. v. Brown*, Ind., 84 N. E. Rep. 25.

125. **Injuries to Animals.**—In an action for killing plaintiff's mare, the giving of an instruction and the refusal of an instruction requested by defendant held error.—*Rhinehart v. St. Louis & S. F. R. R. Co.*, Mo., 108 S. W. Rep. 103.

126. **Injuries to Persons on Track.**—Where a person is loitering or standing on a railroad crossing, he may be guilty of negligence, but it cannot be said that the railroad owes him no duty of warning.—*Central of Georgia Ry. Co. v. Motz*, Ga., 61 S. E. Rep. 1.

127. **Receivers—Compensation.**—The allowance of compensation to a receiver for himself and his attorneys must be made in the first instance by the court appointing the receiver, where the action is pending, and the allowance of that court binds only the parties to the suit.—*Berry v. Rood*, Mo., 108 S. W. Rep. 22.

128. **Religious Societies—Ecclesiastical Controversies.**—Civil courts have no jurisdiction of ecclesiastical controversies which do not violate civil or property rights.—*Fussell v. Hall*, Ill., 84 N. E. Rep. 42.

129. **Sales—Action for Damages.**—In an action for breach of a contract to purchase beams to be manufactured, the profit on a sale to another, though made after commencement of the action, should be deducted from the seller's damage.—*Isaacs v. Terry & Tench Co.*, 109 N. Y. Supp. 792.

130. **Breach of Warranty.**—Where plaintiff by misrepresentation as to quality sold goods by sample to defendant, who upon discovering the breach of warranty notified plaintiff, held that in an action for the price of the goods defendant could use the breach of warranty as a defense by way of setoff.—*Webb & Preston v. Milford Shoe Co.*, Ky., 108 S. W. Rep. 229.

131. **Implied Warranty.**—A woolen merchant selling cloth not of his own manufacture to a tailor does not impliedly warrant the qual-

ity or fitness thereof, even as to latent defects. *Strauss v. Salzer*, 109 N. Y. Supp. 734.

132.—**Warranties.**—A manufacturer selling a beverage for re-sale held to impliedly warrant that it may be sold without obtaining a liquor license.—*Haynor Mfg. Co. v. Davis*, N. C., 61 S. E. Rep. 54.

133. **Salvage—Nature of Service.**—There can be no lien for salvage for services rendered to a vessel while in a dry dock, permanently attached to the shore, for repairs, in extinguishing a fire communicated to such vessel from buildings on the land; nor is a suit to enforce a claim for such services within the admiralty jurisdiction.—*The Jefferson*, U. S. D. C., E. D. Va., 158 Fed. Rep. 358.

134. **Schools and School Districts.**—Public Schools.—In a suit to enjoin the issue of bonds to build a school building, even if plaintiff was estopped to question the illegality of a meeting of the district board by having participated therein and having knowledge thereof, such facts were a matter of defense by way of estoppel.—*Riggs v. Polk County*, Or., 95 Pac. Rep. 5.

135.—**Validity of Bonds.**—Proceedings for the issuance of school bonds taken by the trustees of a district held not affected by the fact that they cast lots to determine the length of their respective terms, the term of none of them having expired.—*McGinnis v. Board of Trustees of Bardstown Gradd School Dis.*, Ky., 108 S. W. Rep. 289.

136. **Statutes.**—Construction.—The words "and" and "or," when used in a statute, are convertible as the sense may require.—*People v. Butler*, 109 N. Y. Supp. 900.

137.—**Construction of Penal Statutes.**—Although penal laws are to be construed strictly, they are not to be construed so strictly as to defeat the obvious intention of Congress, and this intention is to be collected from the words employed in the statute.—*United States v. Lonabaugh*, U. S. D. C., D. Wyo., 158 Fed. Rep. 314.

138. **Subrogation—Rights of Surety.**—Where a creditor has proved his debt in bankruptcy, the surety held entitled to subrogate himself to the creditor's rights on paying the balance due.—*Schmitt v. Greenberg*, 109 N. Y. Supp. 881.

139. **Taxation—Liability of Executor.**—The executor of a trustee is not liable for taxes on a trust estate held by his testator during the testator's lifetime, but not held or administered on by the executor.—*State v. Valley Trust Co.*, Mo., 108 S. W. Rep. 97.

140.—**National Banks.**—The cashier of a national bank as agent of the bank has no authority to list the capital stock for assessment against the bank, and the mistake of the cashier in so listing the capital stock will not estop the bank from recovering the taxes paid under protest on such void assessment.—*Welser Nat. Bank v. Jeffreys*, Idaho, 95 Pac. Rep. 23.

141.—**Tax Deeds.**—The recording of a valid tax title is notice that the grantee therein disclaims a tenancy under a lease of the premises, and an action against him must be brought within two years.—*Hudson v. Schumpert*, S. C., 61 S. E. Rep. 104.

142. **Towns—Public Debt.**—A township advisory board has no power to make an appropriation, unless there are funds available for that purpose or create any indebtedness in excess of the debt limit fixed by Const. art. 13, sec. 1.—*State v. Johns*, Ind., 84 N. E. Rep. 1.

143. **Trespass to Try Title—Burden of Proof.**—In trespass to try title, where plaintiffs

claimed an equity as against the legal title in defendants, the burden was on the plaintiffs to show that the defendants were not bona fide purchasers.—*Wallis, Landes & Co. v. Dehart*, Tex., 108 S. W. Rep. 180.

144. **Trial—Directing Verdict.**—Where plaintiff fails to state a case upon his opening, presiding judge is authorized to order a verdict for defendant at once, or to wait until the plaintiff's evidence or the entire evidence has been introduced before doing so.—*Hey v. Prime*, Mass., 84 N. E. Rep. 141.

145.—**Direction of Verdict.**—It is improper to peremptorily instruct for plaintiff in any cause where his prima facie case is not admitted, or where it is admitted, if defendant has introduced evidence which tends to disprove it.—*Reynolds v. Hood*, Mo., 108 S. W. Rep. 86.

146.—**Evidence.**—A general manager of a corporation may not testify as to what the nature of his duties are, where the by-laws of the corporation prescribe such duties, since the by-laws are the best evidence.—*Green v. Hereford*, Ariz., 95 Pac. Rep. 105.

147.—**Instructions.**—Abstract propositions of law in instructions when not pertinent and necessary to the case as made tend rather to confuse than aid the jury, and it is the better practice to reduce the issue of fact to as limited a compass as is consistent with full instructions.—*Salmon v. Helena Box Co.*, U. S. C. C. of App., Eighth Circuit, 158 Fed. Rep. 300.

148.—**Peremptory Instructions.**—It was error to grant a peremptory instruction for defendant in an action for damages for destruction of property by fire, where there was evidence that the fire was set out by defendant's servant.—*Gibson v. W. C. Wood Lumber Co.*, Miss., 45 So. Rep. 834.

149. **Trover and Conversion—Damages.**—In estimating the value of personality converted plaintiff may recover the highest amount which he can prove between the time of conversion and trial.—*Walton v. Henderson*, Ga., 61 S. E. Rep. 28.

150. **Trusts—Creation of Trust.**—Whether words and acts of an alleged trustor indicate with reasonable certainty an intention to create a trust, and the subject, purpose, and beneficiary of the trust, is a question of fact.—*Noble v. Learned*, Cal., 94 Pac. Rep. 1047.

151.—**Enforcement.**—Where two stockholders deposited their stock with another under an agreement that the stock should be sold for the benefit of the corporation, both stockholders were necessary parties to an action based on the violation of the agreement.—*Parmenter v. Homans*, 109 N. Y. Supp. 800.

152. **United States—Indian Commissions.**—The disbursing officer of an Indian Treaty Commission held required to account to the government for payments made to one of the commissioners for subsistence and for salary paid to him while he was absent from the field on leave.—*United States v. Hoyt*, U. S. C. C., E. D. Wash., 158 Fed. Rep. 162.

153. **Vendor and Purchaser—Bond to Convey.**—A bond for title executed by a trustee under which the obligee went into possession held sufficient to vest the equitable title in the obligee sufficient to sustain a subsequent conveyance of the legal title as against a judgment creditor of the beneficiary.—*Oder v. Jump*, Ky., 108 S. W. Rep. 292.

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DO THE MARRIED WOMEN'S ACTS PERMIT A PERSONAL JUDGMENT TO BE RENDERED AGAINST A MARRIED WOMAN GARNISHED FOR HER HUSBAND'S DEBT?

Our various Married Women's Acts which have attempted to remove some, if not all, of the common law disabilities of married women, have involved the courts in much confusion. Possibly the unfriendly attitude of the courts toward this legislation is responsible for some of the difficulty in which they often find themselves in determining the status of married women under these modern statutes.

A federal district court had occasion recently to wrestle with the Arkansas Married Women's Act, and the decision of the court assumes the hostile attitude which is taken by nearly all the courts towards this legislation, and practically retains the common-law disabilities of married women in spite of the statute, at least so far as they relate to actions between husband and wife, or actions by third persons to reach property of the husband in the wife's possession.

The case to which we refer in the preceding paragraph is that of *Allen-West Commission Co. v. Grumbles*, 161 Fed. 461, where it was held that a personal judgment could not be rendered against a married woman garnished for her husband's debt. In that case the attempt was made to reach, by garnishment, money which the wife had obtained by the sale of some of her husband's personalty. On the garnishment proceedings it was shown that at the time of the service of the garnishment the wife had in her possession the property sought to be reached, but afterwards turned it over to her husband. The plaintiff

sought to secure a personal judgment against the wife, but the court held this to be impossible, even though the statute permitted married women to sue and be sued, on the ground that the husband was not given the right by such a statute to sue his wife, and, therefore, since the creditor cannot recover from the garnishee if the debtor himself could not, the plaintiff's action against the wife of the debtor for a personal judgment must fail.

While the argument of Judge Rogers in this case is apparently irresistible in its logic, we desire to call attention to a practical difficulty which such a construction of our Married Women's Acts raises, to-wit: that it enables a wife to assert her common-law disabilities whenever she is sued, or where for any other reason such assertion is desirable, but dignifies her with all the rights of a person *sui juris* when she herself comes to sue or to engage in business, or to enforce her contracts or her right to hold property. At common law a creditor could attach any personal property in the possession of the wife for the husband's debts (*Miles v. Williams*, 1 P. Wms. 249), but under the Married Women's Acts the wife's personality is exempt from executions against the husband, (21 Cyc. 1585). A creditor is therefore in a worse situation so far as regards the husband's or wife's personal property which may pass so readily from one to the other than he was before the disabilities of coverture were removed.

Take the situation in the principal case as an instance. A wife sells some of her husband's personalty and receives the money therefor. At common law the creditor need not wait a minute; he can order the sheriff to seize the property, or the proceeds, as the husband's, under an attachment against the husband. Under our Married Women's Acts this procedure is impossible. The wife is *sui juris* to the extent, at least, that she can now receive personal property from her husband, and can hold it in her own right free from the control of her husband and from seizure

under execution or attachment for his indebtedness. Such statutes make it necessary, in order for the creditor to reach personal property belonging to the husband in the hands of the wife, to summon her as garnishee. Then, if he cannot go further and compel her to respond personally where she is proven to have been possessed of the personalty sought to be reached, and refuses to turn it over or to make satisfactory disclosure, opportunities for gross injustice are afforded under the protection of law.

Moreover, even if the husband could sue his wife under any of the Married Women's Acts, he could not recover from her a valid gift of personalty, even where made without consideration. But, would the court in the principal case have said in such a case, that the wife could not have been summoned as garnishee and judgment rendered against her, simply on the ground that the debtor could not have recovered the gift from his wife in an action against her? No; because Judge Rogers specially excepts such a case, saying: "The rule that a plaintiff by garnishment cannot place himself in a superior position as regards a recovery than is occupied by the principal defendant is subject, under the weight of modern decisions, to the exception that, where one is in possession of property of another upon a contract which was fraudulent as to creditors, it may, in his hands, be reached by garnishment." Why, then, make an exception in a case where under statute or judicial construction the husband or wife are not permitted to sue one another? A gift of personalty by the husband to the wife may be good as to all the world except as to the husband's creditors. The latter's action against the wife in the form of a garnishment proceeding is more in the nature of an action to declare such a conveyance fraudulent, and to seize it for the creditor's protection. Garnishee process, however, is the only effective process in such cases. It does the creditor no benefit to have the wife return the gift to her husband. He must be permitted either

to seize it in her possession as the property of the debtor or to hold her personally responsible as garnishee for the value of the personalty which she thus holds at the time of the service of the garnishment process.

We believe that the Maryland Supreme Court in the case of *Odend'hal v. Devlin*, 48 Md. 440, reaches the right conclusion on this question. In this case the process was reversed, to-wit, the wife's creditors were attempting to garnishee a gift of personalty in the husband's possession. The principle, however, is the same, as objection was there made that since the wife could not sue the husband, the latter could not be reached as garnishee by the wife's creditors. The court in sustaining a judgment against the husband, used this language: "The marital relations in this state have been materially changed by the Code so far as rights of property are concerned. The wife may be seized of the legal estate in lands, and she may hold the legal property in personalty, in her own right: no trustee being necessary, and, in respect to property held to her sole and separate use, she has the right to resort to courts of law or equity for its protection. A married woman carrying on business in her own name as a sole trader contracts debts in respect to her business as if she were a feme sole. The remedy given to her creditors for the recovery of debts due them, by the process of attachments against her property, and credits, would be nugatory and worthless, if she could be permitted to place her funds or property in the hands of her husband, and it should be held that an attachment of this kind could not be laid in his hands as garnishee."

NOTES OF IMPORTANT DECISIONS

EASEMENT—WHAT IS A "WAY OF NECESSITY?"—What is a way of necessity which is supposed to go with a conveyance of land? Does it mean a way of convenience or must the way, sought to be imposed on the land of another, be one of actual necessity? Thus.

for instance, suppose a wagon road cutting across the grantor's land connects over a level piece of ground with the county rock road in the direction of the county seat at a distance of five hundred yards. Suppose also, however, the grantee's land at some distant corner in an opposite direction from the county seat touches a dirt road which, after some miles of meandering, finally reaches the county road, and suppose also the way across the grantee's land to this distant corner is rough and very steep and never graded for a wagon road, do these facts entitle the grantee to use the short, smooth road over the grantor's land as a way of necessity?

This was the question before the California Supreme Court in the case of *Corea v. Higuera*, 95 Pac. Rep. 882, where it was held that such facts did not entitle the grantee to a way of necessity to be imposed on the grantor's land as an easement. Of course, if the "way" were an "appurtenance" that went with the conveyance of the land to the grantee that would be a different question, but where the facts are not sufficient to dignify the "way" as an appurtenance, it must be proved to be a "way as necessity" in order to establish it as an easement. This is in effect the court's decision. The judge who wrote the opinion makes the following statement: "The principal point urged is that neither the complaint nor the findings state a case entitling the plaintiff to relief. Assuming that the plaintiff claims a 'way of necessity,' the appellants argue that the facts alleged and found do not authorize the assertion of such right. This conclusion is undoubtedly sound. The complaint shows, as do the findings, that the land conveyed to plaintiff's predecessor was at all times bounded on one side by the Higuera ranch road, which connected with the county roads. This circumstance alone is fatal to the existence of a way of necessity. The facts that there was no constructed track for teams connecting plaintiff's land with the Higuera ranch road, as may be inferred from the complaint, or that, as the court finds, plaintiff had not 'easy access' to that road, would not entitle him to assert a right of way by necessity."

The case of *Kripp v. Curtis*, 71 Cal. 62, 11 Pac. 879, is very pertinent to this question and the declaration of the court is very clear. The court in that case said: "The right of way from necessity must be in fact what the term naturally imports, and cannot exist except in cases of strict necessity. * * * That the way over his land is too steep or too narrow, or that other and like difficulties exist, does not alter the case, and it is only when there is no way through his own land that a grantee

can claim a right over that of his grantor. It must also appear that the grantee has no other way."

THE SANCTION OF INTERNATIONAL LAW.*

One accustomed to the administration of municipal law who turns his attention for the first time to the discussion of practical questions arising between nations and dependent upon the rules of international law, must be struck by a difference between the two systems which materially affects the intellectual processes involved in every discussion, and which is apparently fundamental.

The proofs and arguments adduced by the municipal lawyer are addressed to the object of setting in motion certain legal machinery which will result in a judicial judgment to be enforced by the entire power of the state over litigants subject to its jurisdiction and control. Before him lies a clear, certain, definite conclusion of the controversy, and for the finality and effectiveness of that conclusion the sheriff and the policeman stand always as guarantors in the last resort.

When the international lawyer, on the other hand, passes from that academic discussion in which he has no one to convince but himself, and proceeds to seek the establishment of rights or the redress of wrongs in a concrete case, he has apparently no objective point to which he can address his proofs or arguments, except the conscience and sense of justice of the opposing party to the controversy. In only rare, exceptional and peculiar cases, do the conclusions of the international lawyer, however clearly demonstrated, have behind them the compulsory effect of possible war. In the vast majority of practical questions arising under the rules of international law there does not appear on the surface to be any

*We have been requested to republish this great address of Hon. Elihu Root. The subject is one of increasing importance, which every well-informed lawyer should understand.

reason why either party should abandon its own contention or yield against its own interest to the arguments of the other side. The action of each party in yielding or refusing to yield to the arguments of the other appears to be entirely dependent upon its own will and pleasure. This apparent absence of sanction for the enforcement of the rules of international law has led great authority to deny that those rules are entitled to be called law at all; and this apparent hopelessness of finality carries to the mind, which limits its consideration to the procedure in each particular case, a certain sense of futility of argument.

Nevertheless, all the foreign offices of the civilized world are continually discussing with each other questions of international law, both public and private, cheerfully and hopefully marshaling facts, furnishing evidence, presenting arguments and building up records, designed to show that the rules of international law require such and such things to be done or such and such things to be left undone. And in countless cases nations are yielding to such arguments and shaping their conduct against their own apparent interests in the particular cases under discussion, in obedience to the rules which are shown to be applicable.

Why is it that nations are thus continually yielding to arguments with no apparent compulsion behind them, and before the force of such arguments abandoning purposes, modifying conduct, and giving redress for injuries? A careful consideration of this question seems to lead to the conclusion that the difference between municipal and international law, in respect of the existence of forces compelling obedience, is more apparent than real, and that there are sanctions for the enforcement of international law no less real and substantial than those which secure obedience to municipal law.

It is a mistake to assume that the sanction which secures obedience to the laws of the state consists exclusively or chiefly of the pains and penalties imposed by the law itself for its violation. It is only in ex-

ceptional cases that men refrain from crime through fear of fine or imprisonment. In the vast majority of cases men refrain from criminal conduct because they are unwilling to incur in the community in which they live the public condemnation and obloquy which would follow a repudiation of the standard of conduct prescribed by that community for its members. As a rule, when the law is broken the disgrace which follows conviction and punishment is more terrible than the actual physical effect of imprisonment or deprivation of property. Where it happens that the law and public opinion point different ways, the latter is invariably the stronger. I have seen a lad grown up among New York toughs break down and weep because sent to a reformatory instead of being sentenced to a state's prison for a violation of law. The reformatory meant comparative ease, comfort, and opportunity for speedy return to entire freedom; the state's prison would have meant hard labor and long and severe confinement. Yet in his community of habitual criminals a term in state's prison was a proof of manhood and a title to distinction, while consignment to a reformatory was the treatment suited to immature boyhood. He preferred the punishment of manhood with what he deemed honor to the opportunity of youth with what he deemed disgrace. Not only is the effectiveness of the punishments denounced by law against crime derived chiefly from the public opinion which accompanies them, but those punishments themselves are but one form of the expression of public opinion. Laws are capable of enforcement only so far as they are in agreement with the opinions of the community in which they are to be enforced. As opinion changes old laws become obsolete and new standards force their way into the statute books. Laws passed, as they sometimes are, in advance of public opinion ordinarily wait for their enforcement until the progress of opinion has reached recognition of their value. The force of law is in the public opinion which prescribes it.

The impulse of conformity to the standard of the community and the dread of its condemnation are reinforced by the practical considerations which determine success or failure in life. Conformity to the standard of business integrity which obtains in the community is necessary to business success. It is this consideration, far more frequently than the thought of the sheriff with a writ of execution, that leads men to pay their debts and to keep their contracts. Social esteem and standing, power and high place in the professions, in public office, in all associated enterprise, depend upon conformity to the standards of conduct in the community. Loss of these is the most terrible penalty society can inflict. It is only for the occasional nonconformist that the sheriff and policemen are kept in reserve; and it is only because the nonconformists are occasional and comparatively few in number that the sheriff and policeman can have any effect at all. For the great mass of mankind, laws established by civil society are enforced directly by the power of public opinion, having, as the sanction for its judgments, the denial of nearly everything for which men strive in life.

The rules of international law are enforced by the same kind of sanction, less certain and peremptory, but continually increasing in effectiveness of control. "A decent respect to the opinions of mankind" did not begin or end among nations with the American Declaration of Independence; but it is interesting that the first public national act in the New World should be an appeal to that universal international public opinion, the power and effectiveness of which the New World has done so much to promote.

In former times, each isolated nation, satisfied with its own opinion of itself and indifferent to the opinion of others, separated from all others by mutual ignorance and misjudgment, regarded only the physical power of other nations. Gibbon could say of the Byzantine Empire: "Alone in the universe, the self-satisfied pride of the

Greeks was not disturbed by the comparison of foreign merit; and it is no wonder if they fainted in the race, since they had neither competitors to urge their speed nor judges to crown their victory." Now, however, there may be seen plainly the effects of a long-continued process which is breaking down the isolation of nations, permeating every country with better knowledge and understanding of every other country, spreading throughout the world a knowledge of each government's conduct to serve as a basis for criticism and judgment, and gradually creating a community of nations, in which standards of conduct are being established, and a worldwide public opinion is holding nations to conformity or condemning them for disregard of the established standards. The improved facilities for travel and transportation, and enormous increase of production and commerce, the revival of colonization and the growth of colonies on a gigantic scale, the severance of the laborer from the soil, accomplished by cheap steamship and railway transportation and the emigration agent, the flow and return of millions of emigrants across national lines, the amazing development of telegraphy and of the press, conveying and spreading instant information of every interesting event that happens in regions however remote—all have played their part in this change.

Pari passu with the breaking down of isolation, that makes a common public opinion possible, the building up of standards of conduct is being accomplished by the formulation and establishment of rules that are being gradually taken out of the domain of discussion into that of general acceptance—a process in which the recent conferences at The Hague have played a great and honorable part. There is no civilized country now which is not sensitive to this general opinion, none that is willing to subject itself to the discredit of standing brutally on its power to deny to other countries the benefit of recognized rules of right conduct. The deference shown to this international public opinion is in due

proportion to a nation's greatness and advance in civilization. The nearest approach to defiance will be found among the most isolated and least civilized of countries, whose ignorance of the world prevents the effect of the world's opinion; and in every such country internal disorder, oppression, poverty, and wretchedness mark the penalties which warn mankind that the laws established by civilization for the guidance of national conduct can not be ignored with impunity.

National regard for international opinion is not caused by *amour propre* alone—not merely by desire for the approval and good opinion of mankind. Underlying the desire for approval and the aversion to general condemnation with nations as with the individual, there is a deep sense of interest, based partly upon the knowledge that mankind backs its opinions by its conduct and that nonconformity to the standard of nations means condemnation and isolation, and partly upon the knowledge that in the give and take of international affairs it is better for every nation to secure the protection of the law by complying with it than to forfeit the law's benefits by ignoring it.

Beyond all this there is a consciousness that in the most important affairs of nations, in their political status, the success of their undertakings and their processes of development, there is an indefinite and almost mysterious influence exercised by the general opinion of the world regarding the nation's character and conduct. The greatest and strongest governments recognize this influence and act with reference to it. They dread the moral isolation created by general adverse opinion and the unfriendly feeling that accompanies it, and they desire general approval and the kindly feeling that goes with it.

This is quite independent of any calculation upon a physical enforcement of the opinion of others. It is difficult to say just why such opinion is of importance, because it is always difficult to analyze the action of moral forces; but it remains true

and is universally recognized that the nation which has with it the moral force of the world's approval is strong, and the nation which rests under the world's condemnation is weak, however great its material power.

These are the considerations which determine the course of national conduct regarding the vast majority of questions to which are to be applied the rules of international law. The real sanction which enforces those rules is the injury which inevitably follows nonconformity to public opinion; while, for the occasional and violent or persistent law-breaker, there always stands behind discussion the ultimate possibility of war, as the sheriff and the policeman await the occasional and comparatively rare violators of municipal law.

Of course, the force of public opinion can be brought to bear only upon comparatively simple questions and clearly ascertained and understood rights. Upon complicated or doubtful questions, as to which judgment is difficult, each party to the controversy can maintain its position of refusing to yield to the other's arguments without incurring public condemnation. Upon this class of questions the growth of arbitration furnishes a new and additional opportunity for opinion to act; because, however complicated the question in dispute may be, the proposition that it should be submitted to an impartial tribunal is exceedingly simple, and the proposition that the award of such a tribunal shall be complied with is equally simple, and the nation which refuses to submit a question properly the subject of arbitration naturally invites condemnation.

Manifestly, this power of international public opinion is exercised not so much by governments as by the people of each country whose opinions are interpreted in the press and determine the country's attitude towards the nation whose conduct is under consideration. International opinion is the consensus of individual opinion in the nations. The most certain way to promote obedience to the law of nations and to

substitute the power of opinion for the power of armies and navies is, on the one hand, to foster that "decent respect to the opinions of mankind" which found place in the great Declaration of 1776, and on the other hand, to spread among the people of every country a just appreciation of international rights and duties and a knowledge of the principles and rules of international law to which national conduct ought to conform; so that the general opinion, whose approval or condemnation supplies the sanction for the law, may be sound and just and worthy of respect.

ELIHU ROOT.

New York, N. Y.

PHYSICIANS AND SURGEONS—"MAGIC HEALING" NOT THE "PRACTICE OF MEDICINE."

BENNETT v. WARE.

Court of Appeals of Georgia, May 7, 1908.

One who professes to "heal the sick without the use of medicine," but "by placing his hands upon that portion of the body that is affected by pain," the healing resulting from "magic power given direct from the Lord," is not a medical practitioner, and such treatment of the sick is not the "practice of medicine," as defined and regulated by the statutes of this state.

Hill, C. J.: The plaintiff in error was arrested on a warrant sworn out by the defendant in error charging him with practicing medicine without a license, in violation of the statutes of this state. On a preliminary investigation he was discharged, and thereupon he brought suit against the defendant in error for malicious prosecution and false imprisonment. In the petition he alleges that at the time of his arrest and incarceration in the common jail he was engaged in the "profession of healing diseases without the use of medicine, commonly and better known as a 'Magic Healer'"; that he "heals the sick without the use of medicine in any form or manner whatever by placing his hands upon that portion of the body that is affected by pain; that this gift or magic power is given him direct from the Lord"; that he made no charge for his services, but accepted such compensation as the gratitude of his patients induced them to voluntarily offer, and that, as a result of his arrest and prosecution for practicing medicine without a license, he suffered great humiliation and mortification, lost two days' compen-

sation in "gifts," amounting to \$25 per day, was put to an expense of \$15 in employing a lawyer to defend him against the untruthful accusation, and, in fact, "lost almost his entire practice"; that his prosecution was malicious and without probable cause, and he claims to have been damaged in the sum of \$5,000. A demurrer was filed to this petition on the ground that the allegation showed that the plaintiff was in fact practicing medicine and suggesting remedies for the sick and afflicted, and receiving compensation therefor, without complying with statutes of the state regulating the practice of medicine, and therefore that there was probable cause for his arrest and prosecution. The demurrer was sustained, and this judgment comes to this court.

The direct question for determination is whether the plaintiff, under the facts set out in his petition, was engaged in the practice of medicine as defined by the statutes of this state. He insists that his practice is neither within the letter nor the spirit of the law. By virtue of its police power, the state has enacted legislation to protect the public against unfit and incompetent practitioners of medicine, and to prevent the hurtful results of malpractice. A construction of this legislation will determine the issue made by the record. Section 1477 of the political code of 1895 prescribes who shall be authorized to practice medicine in this state. The practicing physician is required to have "a diploma from an incorporated medical college, medical school or university," or shall be one who has been "in active practice of medicine since the year 1866," after having attended "one or more full terms at a regularly chartered medical college," "or who was by law authorized to practice medicine in 1866, or shall have been licensed by the medical board." It is further provided that the governor of the state shall appoint three separate boards of medical examiners, each board to consist of five members selected from the three schools or systems of medicine designated by the statute, to wit, the "regular," or allopathic school, the homeopathic and the eclectic school. Persons who desire to practice medicine, and who are graduates of any incorporated medical college, school, or university requiring the designated course of study, are to be examined by one of these boards, the graduate of a particular school to be examined by the board composed of practitioners of that school. But, if the applicant desires to practice a system not represented by any one of the three boards, he may elect for himself the board before which he will appear for examination. When the examination is satis-

factory, the applicant is granted a certificate allowing him to practice medicine upon complying with the law in reference to registration. Pol. Code 1895, secs. 1479, 1482, 1486. Section 1478 of the political code, of 1895 undertakes to define the practice of medicine. "The words 'practice medicine' shall mean, to suggest, recommend, prescribe or direct, for the use of any person, any drug, medicine, appliance, apparatus, or other agency, whether material or not material, for the cure, relief, or palliation of any ailment or disease of the mind or body, or for the cure or relief of any wound, fracture, or other bodily injury or any deformity, after having received or with the intent of receiving therefor, either directly or indirectly, any bonus, gift, or compensation." Section 1490 declares that "any person shall be regarded as practicing medicine or surgery, within the meaning of this article who shall prescribe for the sick or those in need of medicine or surgical aid, and shall charge or receive therefor money or other compensation, or consideration, directly or indirectly."

In construing these statutes, it is apparent that the law of this state recognizes only three systems or schools of medicine—the "regular," the homeopathic, and the eclectic schools. It is impossible for one who desires to practice any other system to do so in this state as a practitioner of medicine, because under the law he cannot procure a license. In other words, the law only proposes to grant a license to practice medicine to the allopath, the homeopath, or the eclectic. It is true the statute provides that, "if the applicant desires to practice a system not represented by any of the" three boards, "he may elect for himself the board before which he will appear for examination" (section 1486); but this is a barren privilege, for none of the three boards can or will examine any applicant except one who has a diploma from a regular medical college, or who proposes to practice one of the three systems. For instance, none of the boards will recognize a diploma of an osteopath issued by an osteopathic school, because such school is not a regular school, and none of the boards would be competent to examine the osteopathic applicant on the system that he had studied, and the applicant would not be competent to pass an examination in any of the systems represented by the boards, for such systems formed no part of his curriculum. It would be absurd to say that one who practiced the healing art by magnetism, Christian Science, Spiritism, hypnotism, mesmerism, or any other form for the treatment of disease based upon a supernatural agency would be entitled to be examined by any one of the

medical boards of the state; for the science of medicine is based on natural agencies. We therefore conclude that only those who propose to practice medicine by one of the schools or systems recognized by the statutes of this state are required to have a license.

But it is said that section 1478 of the political Code of 1895, undertakes to define the practice of medicine, and that this definition embraces the particular practice of the plaintiff in error. He expressly disclaims the use of medicine in any form whatever in his treatment of diseases, and therefore he must be excluded from the specific words of the definition, because he did not suggest, recommend, prescribe, or direct the use of any drug or medicine, appliance, or apparatus. According to his statement, his method consisted simply in laying his hands on the sick at the point or place of pain or disease, and the healing which followed was by a direct divine agency. Do the words in the statutory definition above given, "or other agency, whether material or not material, for the cure, relief, or palliation of any ailment or disease of the mind or body," embrace an agency of this character? It may be conceded that the words "material or not material" are sufficiently broad to include at least every human or natural agency. But was it intended by the legislature to denominate as a medical agency, whether material or not material, an agency claimed to be supernatural? It is true that faith on the part of the sick is a potent influence in all treatment of disease; but can it be said that faith is an agency? Are the sick who may be cured by magnetism, mesmerism, or hypnotism cured by any medical agency; or is an answer to prayer such an agency and the person who prays practicing medicine? We cannot believe that the legislature intended to include in the practice of medicine what may be called psycho-therapeutics, or any form of the treatment of the sick which makes faith the curative agency. But the words "other agency," "material or not material," should be construed in obedience to the maxim, "Noscitur a sociis," and the meaning of the word "agency" must be limited by the associated words "drug, medicine, appliance, apparatus." In other words, the word "agency," even as qualified by the words "material or not material," was intended by the legislature to mean a substance of the general character of a drug or medicine or surgical apparatus or appliance, the obvious purpose being to protect society against the evils which might result from the use of drugs and medicines by the ignorant and unskillful. The purpose of the act is

clearly indicated by its title "to regulate the practice of medicine." It was not intended to regulate the practice of mental therapeutics or to embrace psychic phenomena. These matters lie within the domain of the supernatural. Practical legislation has nothing to do with them. If they are a part of a man's faith, the right to their enjoyment cannot be abridged or taken away by legislation. However the so-called wisdom of this world may regard these things, it cannot be denied that, long before the Savior told His disciples that in His name they should heal the sick and prevent all manner of diseases by the laying on of hands, the practice of healing by means of prayers, ceremonies, laying on of hands, incantations, hypnotism, mesmerism, and other forms of psycho-therapeutics existed. To the iconoclast who denounces these things as the figments of superstition, or to the orthodox physician who claims for his system all wisdom in the treatment of human malady, we commend the injunction of Him who was called "the Good Physician," when told that others than His followers were casting out devils and curing diseases: "Forbid them not." What matters the system, if, in fact, devils are cast out, and diseases are healed?

Going back to the question now under consideration, we deduce the following proposition: That the practice of medicine, defined by the code, *supra*, is limited to prescribing or administering some drug or medicinal substance, or to those means and methods of treatment for prevention of disease taught in medical colleges and practiced by medical practitioners; that the purpose of the act regulating the practice of medicine was to protect the public against ignorance and incompetency by forbidding those who were not educated and instructed as to the nature and effect of drugs and medicine, and for what diseases they could be administered, from treating the sick by such medical remedial agencies; that the law is not intended to apply to those who do not practice medicine, but who believe, with Dr. Holmes, that "it would be good for mankind, but bad for the fishes, if all the medicines were cast into the sea," nor to those who treat the sick by prayer or psychic suggestion. In the language of Chief Justice Clark: "Medicine is an experimental, not an exact science. All the law can do is to regulate and safeguard the use of powerful and dangerous remedies; * * * but it cannot forbid dispensing with them." "All the law so far has done or can do is to require that those practicing on the sick with drugs * * * shall be examined and found competent by those of like faith and

order.'" *State v. Biggs*, 133 N. C. 729, 46 S. E. Rep. 401, 64 L. R. A. 139, 98 Am. St. Rep. 741. We are therefore clear that plaintiff in error was not a practitioner of medicine in the sense of our statute or in the popular sense; and the fact that he received fees and compensation for treatment in the shape of gifts could not make what would otherwise not be the practice of medicine a violation of the statute regulating such practice, for it must be apparent that, if the mere laying on of hands amounts to the practice of medicine in any sense, it is so without reference to fee or reward.

In the view herewith presented, we are strengthened by the decisions of courts of last resort in this country construing similar statutes. Osteopathy, a system of treating disease without the use of medicine in any form (which has made great advances in recent years, and, if the testimony of many intelligent men and women is to be believed, has worked many cures), has been frequently held not to be included in the term "practice of medicine or surgery," and therefore not included in the statute regulating the practice of medicine and surgery. The earliest case on the subject is that of *Smith v. Lane*, 24 Hun, 632, in which the Supreme Court of New York held that the practice of Osteopathy was not included in the statute, which declared it to be a misdemeanor for any person to practice medicine or surgery who was not authorized to do so by a license or diploma from some chartered medical school, state board of medical examiners, or medical society. This decision was based upon the idea that under the statute of New York no one would be issued a license to practice medicine unless he had a diploma from a regular medical college; the court giving to the words "practicing medicine" their usual, ordinary, and popular significance, and asserting that the purpose of the act was to prevent incompetent or unqualified persons from administering or applying medical agencies, or performing surgical operations that might be dangerous to the health, as well as to the lives of the persons treated or operated upon, and that the purpose of the statute was to confine the use of medicines and the operation of surgery to a class of persons who, upon examination, should be found competent and qualified to follow these professional pursuits, but that no such danger could possibly arise from the treatment of an osteopath, and for that reason no necessity existed for interfering with his pursuit by legislative action. A similar ruling was made in the case of an osteopath by the Supreme Court of Ohio in the case of

State v. Liffing, 61 Ohio St. 39, 55 N. E. Rep. 168, 46 L. R. A. 334, 76 Am. St. Rep. 358. The Ohio statute entitled "An act to regulate the practice of medicine," in defining the "practice of medicine" uses the words "prescribe, direct, or recommend for the use of any person any drug or medicine, or other agency." That court held that a "system of rubbing and kneading the body," commonly known as osteopathy, for the treatment, cure, and relief of diseases and bodily infirmities was not an "agency" within the meaning of the statute. The Supreme Court of Kentucky in *Nelson v. State Board of Health*, 108 Ky. 769, 57 S. W. Rep. 501, 50 L. R. A. 383, held that one who practices osteopathy, not using medicine or surgical appliances, is not engaged in the practice of medicine within the meaning of the statute requiring a license for such practice, the language construed being, "to open an office for the practice of medicine, or to announce to the public in any way a readiness to treat the sick or afflicted, shall be deemed to engage in the practice of medicine within the meaning of this act"; and that this language referred only to those essaying to practice medicine proper by the use of drugs. In the case of *State v. McKnight*, 131 N. C. 717, 42 S. E. Rep. 580, 59 L. R. A. 187, the supreme court of that state held that an osteopath was not embraced within the term "practice of medicine." Chief Justice Clark, speaking for the court, says: "The state has not restricted the cure of the body to the practice of medicine and surgery—'allopathy,' as it is termed—nor required that before any one can be treated for any bodily ill, the physician must have acquired a competent knowledge of allopathy, and be licensed by those skilled therein. To do that would be to limit progress by establishing allopathy as the state system of healing, and forbidding all others. This would be as foreign to our system as a state church for the cure of souls. All the state has done has been to enact that, when one wishes to practice medicine or surgery, he must, as a protection to the public (not to the doctors), be examined and licensed by those skilled in surgery and medicine. The state can only regulate for the protection of the public. There is also 'divine science' (which some has said is neither divine nor a science), and there may be other methods still. Whether these shall be licensed and regulated is a matter for the lawmaking power to determine. Certainly a statute requiring examination and license before beginning the practice of medicine or surgery neither regulates nor forbids any mode of treatment which absolutely excludes medicine and surgery

from its pathology." In a subsequent case, the same court, by the same learned jurist, in a very elaborate opinion, reaffirmed the decision in the *McKnight* case, declaring that one who holds himself out as curing diseases by a system of drugless healing without medicine or prescription, and who charges and receives fees therefor and has no license, is not guilty of practicing medicine or surgery without license. *State v. Biggs*, *supra*. The Supreme Court of Mississippi, in the case of *Hayden v. State*, 81 Miss. 291, 33 So. Rep. 653, 95 Am. St. Rep. 471, in construing a statute in totidem verbis as the statute of this state, declared that it did not apply to an osteopath who used no drug or medicine, and that the word "agency," used in the statute, was not intended to include such treatment. Many other courts, construing statutes substantially similar to ours, have made like decisions.

We admit that there are some decisions that hold the contrary; but we believe that the better rule and one more in consonance with reason and in harmony with the republican character of our institutions is that all statutes for the regulation of the practice of medicine can be sustained only on the ground that they are necessary to protect the public against quack medical practitioners and impostors who prescribe drugs and medicines in treating diseases, and that these statutes are not directed against or intended to include those who eschew the practice of medicine altogether, but advance some new theory, such as osteopathy, for the alleviation of pain and the curing of the sick, or those who heal or pretend to heal the sick by any form of mental therapeutics such as Christian Science, magnetic treatment, hypnotism, and the like. As to the science of osteopathy, it may be remarked that a majority of the states have, by appropriate legislation, recognized it as a legitimate treatment of the sick, and as not included within existing statutes regulating the practice of medicine. We think these constitute legislative precedents in favor of the construction which we place upon the act in question; and we think, further, that the medical profession represented by the medical boards of this state who are charged with the duty of enforcing the law which regulates the practice of medicine gives the same construction to the statute in its omission to interfere with the rapidly increasing practice of osteopathy. We would not be understood as meaning to embrace the osteopath in the same class with the magnetic healer. The practice of osteopathy is entirely antithetic to magnetic healing. The former relies entirely upon natural agencies—

indeed, we may say physical agencies—while the latter relies solely upon the supernatural. We cite the decisions construing osteopathy as illustrations of our construction of the statute defining the practice of medicine, the argument drawn therefrom being that if the practice of osteopathy, which does require a knowledge of anatomy, physiology, pathology, and what may be called the fundamentals of medical and surgical practice, is not included in such statutes, the practice of the "magic healer" certainly cannot be. In the language of the Supreme Court of Mississippi: "A wise legislature some time in the future will doubtless make suitable regulations for the practice of osteopathy, so as to exclude the ignorant and unskillful practitioner of the art among them. The world needs, and may demand, that nothing good or wholesome shall be denied from its use and enjoyment." *Hayden v. State*, supra. The Supreme Court of Rhode Island, in the case of *State v. Mylod*, 20 R. I. 632, 20 Atl. Rep. 753, 41 L. R. A. 428, holds that the practice of Christian science is not the practice of medicine, and is not included within the act regulating the practice of medicine.

We therefore hold that, under the allegations of the petition, the plaintiff in error was not engaged in the practice of medicine, and therefore was not violating the law regulating such practice in this state. But we do not think that the plaintiff in error was entitled to recover damages for malicious prosecution from the physician who swore out the warrant against him. The question of law involved was sufficiently in doubt, in its application to his practice, to fully warrant a legal investigation of the question; and, in taking out the warrant, the defendant was fully justified by the existence of probable cause, and his act was without malice, and in behalf of the public. Besides, we think that the practice of the plaintiff in error, while not in violation of the statute regulating the practice of medicine, was presumptively an imposition upon the credulity of the public, which might in its consequences result in much injury, and that he was exercising a pretended power of magnetic healing to the deception of the people, and was obtaining their money in the shape of gifts under false pretenses, and we do not think that the law should permit him to recover damages resulting from a legitimate effort on the part of a citizen to test the legality of his practice. We therefore affirm the judgment of the court below in sustaining the demurrer and dismissing the petition.

Judgment affirmed.

NOTE.—*Whether Statutes Regulating the Practice of Medicine Apply to Schemes of Healing Which Do Not Administer Drugs:*—We believe the law on the subject of the regulation of the practice of medicine is settled upon the view adopted by the principal case that statutes setting up standards for the admission of candidates to the practice of medicine do not apply to those who do not administer drugs or other agencies for the palliation of disease.

The reasons for this rule are two. First, such schemes as Osteopathy, Christian Science, Magic Healing, and mental science, do not constitute the practice of medicine. Second, for the court to discountenance such practices except on the ground of actual fraud, would be to show such an intolerant spirit as would paralyze all legitimate investigation except such as proceeded within the old channels.

We call attention to an article on this question 61 Cent. L. J., 424, which takes this position and cites many authorities.

For the benefit, however, of those who entertain a different view of this question we quote here from Justice Powell's dissenting opinion in the principal case which constitutes the best possible argument that statute regulating the practice of medicine especially when so worded as was the Georgia statutes proscribes all forms of healing which do not conform to the standards thus set up. Justice Powell said:

"I concur, but my concurrence is really a dissent from the views so ably propounded by Chief Justice Hill in his opinion. I think that the petition shows that the plaintiff at the time of his arrest was violating our statute against the illegal practice of medicine. Certainly he was not practicing medicine in the ordinary and popular meaning of that expression; but the framers of our statute were not content with that meaning, and gave the phrase a new and enlarged definition. According to section 1478 of the Political Code of 1895, 'the words 'practice medicine' shall mean, to suggest, recommend, prescribe or direct for the use of any person, any drug, medicine, appliance, apparatus or other agency, *whether material or not material* for the cure, relief, or palliation of any ailment or disease of the mind or body, or for the cure or relief of any wound, fracture, or other bodily injury or any deformity, after having received or with intent of receiving therefor, either directly or indirectly, any bonus, gift, or compensation.' If the definition had omitted the words italicised, then the word 'agency,' under the rule of construction denoted by the phrase "*Noscitur a sociis*," would be held to mean some agency of the same nature as drugs, medicines, and appliances, all of which

are material agencies; but with the palpable purpose of forbidding any such construction the Legislature added the words "whether material or not material." Since in the practice of medicine as popularly understood, and as regulated by the statutes of most states, only material agencies are used, it becomes manifest that the object of our statute was to regulate, not only the ordinary practice of medicine, as it is usually subjected to regulation, but also every imaginable practice by which human ingenuity should be likely to undertake to palliate or cure those physical "ills which flesh is heir to." The words "material" and "not material" are absolute contradictories, in that they exclude all middle ground, and together include everything thinkable. Human ingenuity is so multiform in its manifestations and the professing of means to cure diseases of the human mind and body furnishes such a fertile field for its display that in dealing with the question the lawmakers found it necessary to eschew specific enumerations and to employ the broadest and most comprehensive language.

I cannot agree to the proposition that the object of this statute is only to forbid quacks from pretending to be regular physicians when they are not so. The right of the Legislature to say by what systems and by what classes of persons diseases shall be treated springs from the police power of which the health and safety of the people are wards. Just as the legislature may prescribe how plumbing shall be done, of what materials and by what class of persons (*Felton v. City of Atlanta*, 4 Ga. App.—, 61 S. E. Rep. 27), and may thereby exclude other methods which may in fact be just as efficient, though not believed by the law to be so, and may prohibit from working in this profession men who are just as competent as the recognized and licensed plumbers, but who have not in the statutory method proved themselves to be so, so it may limit the methods by which diseases are to be treated, and may exclude every one from attempting to heal them who does not prove himself competent according to the method which the law itself believes to be the fairest and most expedient for testing his competency. I was about to draw a parallelism between the "magic healer" method of dealing with the problem of sanitary sewerage and that same method of dealing with disease, but the very statement of the first proposition would be too nonsensical and ridiculous to be judicial. The law is as much interested in protecting the lowly of intellect from the superstitious handling of disease as in protecting them from the pretentious knowledge of the quack. If every citizen of the state were capable of exercising an intelligent discrimination as to the capacities of those who offer to treat human ills, then the interference of the legislature would be an act supererogation. Only the ignorant or

the superstitious need protection. Those principles of *laissez faire* which would forbid state interference to protect the weaker citizenship from their very weaknesses have never received much recognition in Georgia. The ignorant and superstitious parent, who takes his child critically ill to a "magic healer" when he should seek the advice and treatment of some skilled physician, and thereby lets it die, has done the perpetuation of the race the same injustice as if he had taken a knife and stabbed the child to the heart. Contemplate the effect on the community if a scourge of smallpox or yellow fever should fall upon it, and the people should submit themselves to the care of "magic healers," instead of physicians. The state has an interest in the mental and physical condition of its every citizen.

It may be that the statute which the lawmaking power has seen wise to enact excludes from the right to undertake the healing of the people some whose methods are rational and who therefore ought not to be excluded. Osteopathy may be an efficient system for the cure and palliation of fleshly ills—indeed, I think it probably is. There may be other systems equally good, but now forbidden. If so, the Legislature should authorize them; but, so long as that branch of the government to which this question is addressed says they are noxious to the public health, I feel that we as judges should hold them to be unlawful. My idea is that if any person, not having complied with the requirements of the statute, shall "suggest, recommend, prescribe or direct, for the use of any person any * * * agency, whether material or not material for the cure, relief, or palliation of any ailment or disease of the mind or body, * * * after having received or with the intent of receiving therefor, either directly or indirectly, any bonus, gift, or compensation," he is guilty of a misdemeanor; and that the plaintiff who confesses in his petition that "his profession is and was at the time of his arrest * * * that of healing diseases without the use of medicine, commonly and better known as a 'magic healer,'" and that at that time he had a "lucrative practice" in several counties conclusively shows that probable cause existed for his arrest for a violation of the statute. It boots not that the plaintiff points to the prophets and apostles, and says "it is a matter of Christian right." If so, let him give the powers without price. "Freely ye have received, freely give," was Christ's command, as he gave his apostles miraculous power over disease and death. Simony is equally abhorrent to the divine as to the civil law. So witness Simon Magus, also Gehazi, servant of Elisha, who took the talents and changes of raiment which his master had refused for curing Naaman's leprosy and therefore suffered the master's curse, and "went out from his presence a leper as white as snow."

HUMOR OF THE LAW.

In correcting the exercises of her class at the American School a teacher recently observed a new name inscribed on one of the papers—Tom Brown.

She looked around the class, but could see no new boy. Not a little puzzled, she requested Tom Brown to stand.

Up jumped Tommy Smith, and the teacher got more puzzled still.

"Your name's Smith," she said; "not Brown!"

Tommy looked not a little abashed, and shifted uneasily from one foot to the other.

"Please, ma'am," he said, "it's owing to family trouble. I didn't do it, please, ma'am!"

"But," she said sternly, "I repeat, your name is Smith."

"Please, ma'am," said the boy, "it's changed now. Ma's married the lodger!"

The pompous judge glared sternly over his spectacles at the tattered prisoner, who had been dragged before the bar of justice on a charge of vagrancy.

"Have you ever earned a dollar in your life?" he asked, in fine scorn.

"Yes, your Honor," was the response, "I voted for you at the last election."

WEEKLY DIGEST.

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1. **Abatement and Revival** — Pendency of Another Action.—A plea of pendency of another action in a tribunal having concurrent jurisdiction must distinctly show that the same parties and the same subject-matter are before it.—*State v. Stickley*, S. C., 61 S. E. Rep. 211.

2. **Accident Insurance**—Breach of Warranty.—In an action on an accident policy containing a warranty that insured had not had and was not suffering from bronchitis, the proof held not to show conclusively that insured ever suffered from bronchitis within the meaning of the warranty.—*French v. Fidelity & Casualty Co.* of New York, Wis., 115 N. W. Rep. 869.

3. **Action**—Intent to Commit Fraud.—The existence of an intent to commit a fraud, unconnected with an act, is not actionable.—*City Deposit Bank of Columbus, Ohio, v. Green*, Iowa, 115 N. W. Rep. 893.

4. **Adverse Possession**—Easements.—Acquiescence by the owner of two lots in the use of a right of way over one lot by the tenant of the other, afforded no foundation for adverse possession to an agreed boundary line, other than the true line between the lots.—*Teachout v. Duffus*, Iowa, 115 N. W. Rep. 1010.

5. **Taking Successive Possessions**.—Adverse possession of ancestor and heir may be tacked to make out the period necessary to establish title by adverse possession or presumption of a deed.—*Powers v. Smith*, S. C., 61 S. E. Rep. 222.

6. **Appeal and Error**—Effect of Former Decision.—Where a decision of the Supreme Court is reversed by the Court of Appeals, and on a new trial evidence is introduced tending to overcome the reasons for such reversal, the decision of the Court of Appeals is not binding on the Supreme Court in considering the appeal from the new trial.—*Reilly v. Troy Brick Co.*, 109 N. Y. Supp. 476.

7. **Estoppel to Allege Error**.—If an appellant pays off a money judgment or consents that a judgment be executed and agrees to abide the execution of the judgment, then by that act he "kills" any issue on appeal going to the validity of the judgment itself.—*Hiller v. Cox*, Mo., 109 S. W. Rep. 679.

8. **Objection to Evidence**.—A specific objection on appeal to the admissibility of evidence cannot be considered where there was only a general objection to the evidence in the lower court for incompetency and immateriality.—*Taylor v. City of Jackson*, Mich., 115 N. W. Rep. 977.

9. **Procedure where Record is Incomplete**.—Where a party ascertains that certain letters embracing part of the record are missing, if he wishes to obtain an order of substitution to replace them he must apply within a reasonable time for such relief, and, where he delays his application for 10 months after discovering the defect, he is precluded by his laches.—*Lowery v. Lowery*, Iowa, 115 N. W. Rep. 1035.

10. **Successive Appeals**.—A writ of error cannot be prosecuted by or for a party to an action to reverse the judgment of a district court after that judgment has been affirmed against such party.—*Wandelohr v. Grayson Co. Nat. Bank*, Tex., 108 S. W. Rep. 1154.

11. **Assignment**—Contracts.—A contract for the delivery of cordwood on a railway company's right of way held assignable by the company, so as to impose upon the assignee the obligation to pay for the wood when delivered according to the contract.—*Atlantic & N. C. R. Co. v. Atlantic & N. C. Co.*, N. C., 61 S. E. Rep. 185.

12. **Equitable Assignments**.—An equitable assignment is an assignment of that much of a debt which a court of equity will recognize and

a court of law will not.—*In re Macauley*, U. S. D. C., E. D. Mich., 158 Fed. Rep. 322.

13.—**Rights of Assignee.**—The assignment of a demand entitles the assignee to every assignable remedy, lien, or credit available by the assignor as a means of indemnity or payment, unless expressly excepted in the transfer.—*Roach v. Sanborn Land Co.*, Wis., 115 N. W. Rep. 1102.

14.—**Bankruptcy—Annuities.**—Where a bankrupt, while insolvent, purchased an annuity in a mutual life insurance company, the bankrupt's trustee prior to the date the insurance company was required to pay anything under the contract held entitled to cancel the same and recover the consideration paid by the bankrupt therefor.—*Smith v. Mutual Life Ins. of New York*, U. S. D. C., D. Mass., 158 Fed. Rep. 365.

15.—**Discharge.**—Under Arkansas bankruptcy rule 12 (1) it was improper for a referee in bankruptcy pending proceedings for the examination of the bankrupt to discover assets alleged to have been concealed to report that the proceedings were sufficiently advanced to entitle the bankrupt to his discharge.—*In re Johnson*, U. S. D. C., D. Ark., 158 Fed. Rep. 342.

16.—**Exemptions.**—Under the Alabama law authorizing the selection of exemptions, it was no answer to a bankrupt's right to select exemptions out of property other than household goods claimed by his wife that such goods, in fact, belonged to the bankrupt, and were not scheduled.—*In re Diamond*, U. S. D. C., N. D. Ala., 158 Fed. Rep. 370.

17.—**Oral Assignments.**—It was no objection to the validity of an equitable oral assignment of certain accounts that actual possession thereof was not transferred.—*In re Macauley*, U. S. D. C., E. D. Mich., 158 Fed. Rep. 322.

18.—**Replevin.**—Where a seller of goods to a bankrupt claimed that the sale was induced by fraud, he could not, on rescinding the sale, recover the good in replevin after the appointment of a receiver for the bankrupt's property, though before adjudication.—*In re Alton Mfg. Co.*, U. S. D. C., D. R. I., 158 Fed. Rep. 367.

19.—**Banks and Banking.**—Insolvency and Dissolution.—The closing of a bank and calling on the superintendent of banks to take charge of its assets held, under the facts, not a surrender of the bank's corporate franchise.—*People v. Oriental Bank*, 109 N. Y. Supp. 509.

20.—**Beneficial Associations.**—Compensation of Officers.—Where an officer of a fraternal society was authorized to employ a promoter, it was within the apparent scope of his authority to agree on the compensation.—*Duford v. Parliament of Prudent Patricians of Pompeii*, Mich., 115 N. W. Rep. 1057.

21.—**Benefit Societies.**—Forfeitures.—Forfeitures not being favorites of the law, certificates of insurance in fraternal benefit associations will be strictly construed as to forfeitures provided for therein.—*Leech v. Order of R. R. Telegraphers*, Mo., 109 S. W. Rep. 811.

22.—**Bills and Notes.**—**Bona Fide Purchasers.**—Where claimant purchased certain notes from his agent, and claimed that the agent was a bona fide purchaser for value, the burden was on the claimant to prove such fact and make a full disclosure.—*In re Hopper-Morgan Co.*, U. S. D. C., N. D. N. Y., 158 Fed. Rep. 351.

23.—**Bona Fide Purchasers.**—Held, that the condition of spurious commercial paper under the circumstances of the case was not sufficient to put the purchaser on guard as to its genu-

ineness.—*State v. Corning State Sav. Bank*, Ia., 115 N. W. Rep. 937.

24.—**Indorsement in Blank.**—A note payable to the maker becomes payable to bearer on indorsement in blank by maker, and may be transferred by delivery.—*Roach v. Sanborn Land Co.*, Wis., 115 N. W. Rep. 1102.

25.—**Liability of Sureties.**—Where, in an action on a note and for attorney's fees, judgment was entered against one of the parties for the amount of the note and against the others for the amount of the note and attorney's fees, if the other parties were sureties, the judgment was erroneous.—*Clements v. National Bank of Tifton*, Ga., 61 S. E. Rep. 146.

26.—**Brokers.**—**Authority to Sell Land.**—Authority to sell land may be revoked by the principal where the authority is not given for a valuable consideration, or does not create an interest in the real estate.—*Miller v. Wehrman*, Neb., 115 N. W. Rep. 1078.

27.—**Right to Commission.**—That a principal is ignorant of the efforts of his broker in procuring a customer does not affect the broker's right to a commission.—*Colonial Trust Co. v. Pacific Packing & Navigation Co.*, U. S. C. C. of App., Third Circuit, 158 Fed. Rep. 277.

28.—**Burglary.**—**Sufficiency of Indictment.**—Where a person rents a house as a dwelling, but allows a room therein to be occupied by a boarder, and this room is burglarized, the ownership of the house, in an indictment for burglary, may be alleged in the general or in the special occupant.—*Boyd v. State*, Ga., 61 S. E. Rep. 134.

29.—**Carriers.**—**Carriage of Live Stock.**—The consignor of a stallion shipped over connecting carriers, on the arrival of the stallion at the connecting point, may decline to ship farther, and on payment of the charges of the first carrier demand a redelivery.—*Wente v. Chicago, B. & Q. Ry. Co.*, Neb., 115 N. W. Rep. 859.

30.—**Injuries in Alighting from Moving Train.**—Where a passenger, after being informed that the train will not stop at his intended destination, jumps off the moving train while passing the station, the carrier is not liable for the injuries sustained by him in consequence.—*Owens v. Atlantic Coast Line R. Co. of South Carolina*, N. C., 61 S. E. Rep. 198.

31.—**Negligence.**—While proof of any negligence is admissible in support of general allegations of negligence in an action by a passenger for injuries, allegations of specific acts of negligence will prevent admission of other acts of negligence.—*Kirkpatrick v. Metropolitan St. Ry. Co.*, Mo., 109 S. W. Rep. 682.

32.—**Negligence.**—Whether each of two intersecting railroads was negligent in causing a collision held for the jury, notwithstanding the use of an interlocking device.—*Van Orman v. Lake Shore & M. S. Ry. Co.*, Mich., 115 N. W. Rep. 968.

33.—**Chattel Mortgages.**—**Mistake in Date.**—Where a mortgage on its face shows that it must have been intended to be given on a crop to be sown during the season following its date, the intent will give effect, though the mortgage expresses another year by mistake.—*Gorder v. Hilliboe*, N. D., 115 N. W. Rep. 843.

34.—**Splitting Cause of Action.**—The bringing of a suit on a note for the payment of which a chattel mortgage was given as collateral security is not a splitting of a cause of action, and does not prevent enforcement of the mort-

rage.—Avery Mfg. Co. v. Leathers, Mo., 109 S. W. Rep. 851.

35. **Conspiracy**—Securing Title to Public Lands.—A conspiracy to secure the title to coal lands from the United States through a homestead entry may constitute a conspiracy to defraud the United States within Rev. St. Sec. 5440 (U. S. Comp. St. 1901, p. 3676, although such lands are not subject to lawful homestead entry where the title is secured by means of false proofs.—United States v. Lonabaugh, U. S. D. C., D. Wyoming, 158 Fed. Rep. 314.

36. **Constitutional Law**—Due Process of Law.—The fourteenth amendment to the Constitution of the United States, requiring due process of law, merely applied to the legislation of the states an elementary principle of the common law, which was a part of the fundamental law of the several states and which the federal courts in administering the law of the states were previously bound to recognize and enforce.—Anderson v. Messenger, U. S. C. C. of App., Sixth Circuit, 158 Fed. Rep. 250.

37.—**Right of Mayor to Remove City Officers**.—St. Louis City Charter, art. 4, Secs 5, 15, 16, 47 (Ann. St. 1906, pp. 4823, 4825, 4835), and the ordinances adopted thereunder, empowering the mayor to remove city officers, held not to violate Const. art. 3 (Ann. St. 1906, p. 172), distributing the powers of government, and article 6, Sec. 1 (Ann. St. 1906, p. 212), vesting the judicial power in the courts of the state.—State v. Weils, Mo., 109 S. W. Rep. 758.

38. **Contracts**—Construction.—Ordinarily, in construing a contract, words are prima facie to be given their ordinary meaning, but not when the context or admissible evidence shows that another meaning was intended.—Atlantic & N. C. R. Co. v. Atlantic & N. C. Co., N. C., 61 S. E. Rep. 185.

39.—**Excuse for Defects in Work**.—Where the failure of a refrigerator plant installed in a hospital to do the guaranteed work was caused by the plant having been installed in the manner directed by the hospital's architect over the contractor's protest, the latter may recover for the work, even if the plant did not operate as guaranteed.—Freidenrich v. Condict, 109 N. Y. Supp. 526.

40.—**Failure to Read**.—Failure to read a contract before signing is gross negligence where the signer was able to read.—International Text-Book Co. v. Lewis, Mo., 108 S. W. Rep. 1118.

41.—**Implied Contracts**.—An implied contract held to exist in favor of a tenant that a firm contracting with the owner to make improvements on the building will complete the work within the time specified in their contract with the owner.—Ottumwa Mill & Const. Co. v. Manchester, Iowa, 115 N. W. Rep. 911.

42. **Contribution**—Directors and Officers of Bank.—In an action against officers and directors of a corporation for misconduct, there could be no contribution in equity between those who neither participated in the same acts nor served at the same time.—People v. Equitable Life Assur. Soc. of United States, 109 N. Y. Supp. 453.

43. **Corporations**—Dissolution.—The fact that the business is a losing one under the majority management is not a reason why the minority may have the corporation dissolved in equity, in the absence of some statutory authority.—Platner v. Kirby, Iowa, 115 N. W. Rep. 1032.

44.—**Individual Liability of Trustees**.—The

trustees of a corporation held individually liable for the purchase price paid for the assignment of a permit to drill a well.—Shannon v. Mastin, Mo., 108 S. W. Rep. 1116.

45.—**Liability of Directors**.—A director who was neither an officer nor a member of the executive and finance committees of the corporation held not personally liable for transactions accomplished by them.—People v. Equitable Life Assur. Soc. of United States, 109 N. Y. Supp. 453.

46.—**Liability of Stockholders on Unpaid Stock**.—Attempted reduction of liability of stockholders to a corporation on account of unpaid stock subscriptions by declaration of dividends on the basis of assets which were not profits held void as against creditors of the corporation or a trustee in bankruptcy.—Crawford v. Roney, Ga., 61 S. E. Rep. 117.

47.—**Sale of Stock**.—Failure to disclose to plaintiff that defendant was a stockholder in a company which was intending to purchase stock which defendant asked plaintiff to send to him, if she was willing to accept a certain price, held not a fraud on plaintiff.—Wann v. Scullin, Mo., 109 S. W. Rep. 683.

48.—**Suing on Behalf of Corporation**.—A stockholder of a corporation held, under the circumstances, entitled to sue on behalf of the stockholder to protect the right of the corporation to certain real estate which its president had permitted to be sold for taxes and fraudulently diverted to his own use.—Donnelly v. Sampson, Wis., 115 N. W. Rep. 1089.

49. **Courts**—Failure of Judge to Attend Court.—Where the county judge fails to attend at the commencement of any regular term, all cases pending and triable at such term are, by operation of law, continued to the succeeding term.—Pitman v. Heumeler, Neb., 115 N. W. Rep. 1083.

50. **Criminal Trial**—Argument of Counsel.—It is error for the prosecuting attorney in a criminal case in his address to the jury to comment on facts not in evidence, or to use language calculated to excite the prejudice or inflame the passions of the jury.—State v. Upton, Mo., 109 S. W. Rep. 821.

51.—**Insanity as a Defense**.—Instruction that, if accused was at the time of the commission of the criminal act laboring under an aberration of mind to such a degree that he was unconscious of his acts, he should be acquitted, held not error.—Hamblin v. State, Neb., 115 N. W. Rep. 850.

52.—**Verdict**.—Refusal of trial court to set aside verdict on the ground that the jury had attended a performance at the theater before determination of cause held not error.—State v. Jeffries, Mo., 109 S. W. Rep. 614.

53. **Damages**—Loss of Earning Capacity.—A loss or impairment of earning capacity is an element which may be considered by the jury in estimating the damages one has sustained from a personal injury, although he may have permanently retired from business before he was injured.—El Paso Electric Ry. Co. v. Murphy Tex., 109 S. W. Rep. 489.

54.—**Sufficiency of Petition**.—An averment in the petition that plaintiff was compelled to neglect his business is not equivalent to an averment of loss of time or earnings, and is not sufficient as a basis for the admission of evidence of damage for such loss.—Keen v. St. Louis, I. M. & S. R. Co., Mo., 108 S. W. Rep. 1125.

55. **Death**—Burden of Proving Negligence.—The rule placing the burden of proving want of contributory negligence upon plaintiff in negligence cases held not abrogated even in death actions, where there are no eyewitnesses, nor where the decedent is a child.—*Gallagher v. New York Ry. Co.*, 109 N. Y. Supp. 515.

56. **Deeds**—Delivery.—A deed placed by the grantor in the hands of a third person with unconditional instructions to deliver it at a specified time will, unless the grantor reserves the right to revoke it, pass a present interest in the land.—*Kneeland v. Cowperthwaite*, Iowa, 115 N. W. Rep. 1026.

57. —Duress.—Before a conveyance will be set aside as having been given under duress, the proof must be clear and satisfactory.—*Anderson v. Anderson*, N. D., 115 N. W. Rep. 836.

58. —Rule in Shelley's Case.—Where a conveyance is to one for life with remainder over to the children of the life tenant, the words of the grant are to be taken as words of purchase; and the rule in Shelley's Case has no application.—*Ault v. Hillyard*, Iowa, 115 N. W. Rep. 1030.

59. **Drains**—Proceedings to Clean Drain.—The failure of the drain commissioner to file the papers in proceedings to clean and extend a drain held not to deprive one assessed for the cost of the work of his remedy to review the proceedings.—*Auditor General v. Crane*, Mich., 115 N. W. Rep. 1041.

60. **Estoppel**—Position in Litigation.—Sellers of hay having denied a delivery or that title had passed held estopped to resist the sellers' right to treat the contract as executory, and recover the difference between the price and market value at the date delivery was contemplated.—*Driggs v. Bush*, Mich., 115 N. W. Rep. 985.

61. **Execution**—Forthcoming Bond. — Where the property of a tenant was levied on, and a forthcoming bond given with his landlord as security the tenant could not thereafter deliver the property to the landlord in settlement of a debt, and release the latter from liability on the bond.—*Rowland v. Page*, Ga., 61 S. E. Rep. 148.

62. **Executors and Administrators** — Claims Against Estate.—A daughter held entitled to recover against her father's estate for services, where there was evidence that both father and daughter understood that compensation should be made therefor.—*In re Smith's Estate*, Mich., 115 N. W. Rep. 1052.

63. —Impeachment of Discharge.—Failure of executors to account for shares of stock in a certain corporation held not to warrant disturbing an order of discharge in the absence of a showing of prejudice to a substantial right of a party interested.—*Bradbury v. Wells*, Ia., 115 N. W. Rep. 880.

64. —Sale of Land.—The sale of land belonging to an estate by the administrator subject to the widow's homestead rights, when only a part thereof was subject thereto, was a mere irregularity which did not invalidate the sale on collateral attack.—*Brown v. Hannah*, Mich., 115 N. W. Rep. 980.

65. **Frauds, Statute of** — Part Payment. — Where a buyer of hay paid for baling the same under an oral contract to pay the seller \$10 per ton, the buyer to bale the hay, such payment constituted a sufficient part payment to take the case out of the statute of frauds.—*Driggs v. Bush*, Mich., 115 N. W. Rep. 985.

66. **Fraudulent Conveyance**—Intent to Defraud.—The absence of any intent by grantee to defraud or any circumstance tending to show that grantee knew of any intended fraud may be considered in determining the good faith of a deed.—*Joy v. Helbin*, Cal., 94 Pac. Rep. 863.

67. **Guardian and Ward**—Unauthorized Investments.—An unauthorized investment of a ward's funds is not void, but voidable only, as against one who takes the ward's property with knowledge that the guardian has no authority to transfer it.—*McCutchen v. Roush*, Iowa, 115 N. W. Rep. 903.

68. **Habeas Corpus**—Questions Reviewable.—Where defendant pleaded guilty to a charge of publishing defamatory pictures, the sufficiency of the complaint under which he was convicted may not be reviewed on habeas corpus.—*In re Upson*, Cal., 94 Pac. Rep. 855.

69. **Highways**—Alteration of Width.—Width of a road established by the county commissioners as defined by the road commissioners cannot be increased simply by an order of classification.—*Buchanan v. James*, Ga., 61 S. E. Rep. 125.

70. —Automobile Causing Horse to Frighten.—An operator of an automobile in a street held, as a matter of law, free from negligence, and relieved from liability for injuries caused by a horse taking fright and running away.—*O'Donnell v. O'Neil*, Mo., 109 S. W. Rep. 815.

71. —Regulations.—Where an electric lighting corporation unlawfully erects and maintains its poles and wires on a public highway in which the public has only an easement, ejectment is a proper remedy in an action by the owner of the adjoining land to prevent such unlawful use of the highway.—*Gurnsey v. North California Power Co.*, Cal., 94 Pac. Rep. 858.

72. **Indictment and Information**—Forgery.—Forging and fraudulently uttering and publishing the same instrument by the same person constitutes one crime, which may be charged in a single count of an information.—*State v. Leekins*, Neb., 115 N. W. Rep. 1080.

73. **Injunction**—Trespass.—In a suit to enjoin trespass on land against the one under whom plaintiff claims, it was not necessary that plaintiff prove title in the one under whom she claimed.—*Loudermilk v. Martin*, Ga., 61 S. E. Rep. 122.

74. **Intoxicating Liquors**—Disorderly House.—A single sale or gift of intoxicating liquor by a dramshop keeper to two minors held not to make his place a disorderly one within Ann. St. 1906, Sec. 3012.—*State v. Lichta*, Mo., 109 S. W. Rep. 825.

75. —Illegal Sale.—Where defendant accused of a sale of intoxicating liquors is found in an apparently guilty situation, an unreasonable explanation is worse than none at all.—*Davis v. State*, Ga., 61 S. E. Rep. 132.

76. **Judgment**—Dismissal of Action.—Where a demurrer was properly sustained on the general ground, it was, at least in the absence of a showing that leave to amend was requested, not error to enter judgment of dismissal without granting such leave.—*Bell v. Bank of California*, Cal., 94 Pac. Rep. 889.

77. —Motion for.—Plaintiff's motion for judgment upon the record, including the testimony adduced, made after a jury had been discharged after finding generally and specially for defendant, and after plaintiff was granted a new trial, was properly overruled.—*Hamill v. Joseph Schlitz Brewing Co.*, Iowa, 115 N. W. Rep. 943.

78. **Jury**—Prejudice of Sheriff.—Determination of whether or not sheriff is prejudiced against accused so as to render him incompetent to summon jury panel held for the trial court, and not reviewable.—*State v. Jeffries*, Mo., 109 S. W. Rep. 614.

79. **Landlord and Tenant**—Injuries to Crops.—Where a tenant seeks to recover from a tortfeasor for crops injured, it is not material that he may be held to his landlord or some other persons for an interest in the crop.—*Blunck v. Chicago & N. W. Ry. Co.*, Iowa, 115 N. W. Rep. 1013.

80.—**Lease**—Plaintiffs held tenants at will of defendants, and not bound by a provision of a former lease of the premises absolving defendant from liability for loss by fire.—*Ft. Worth & D. C. Ry. Co. v. J. C. Woolbridge & Son*, Tex., 108 S. W. Rep. 1159.

81.—**Obligation of Tenant**—Where the sole compensation to a lessor is a share of what is produced on the leased premises, there is an implied covenant on the part of the lessee, for a diligent operation of the premises.—*National Light & Thorium Co. v. Alexander*, S. C., 61 S. E. Rep. 214.

82. **Libel and Slander**—**Venue**—A publisher may be sued for libel in any county in which its paper is circulated.—*Meriwether v. Publishers George Knapp & Co.*, Mo., 109 S. W. Rep. 750.

83. **Limitation of Actions**—**Public Lands**—Limitations run against the title of a preceptor of public land from his compliance with the requisites to entitle him to a patent, in favor of one who holds adversely.—*Eastern Banking Co. v. Lovejoy*, Neb., 115 N. W. Rep. 857.

84. **Malicious Prosecution**—**Payment of Money under Duress**—If a person arrested for a debt pays the claim without protest, he cannot maintain an action for malicious prosecution, but, if he denies the indebtedness and pays the money simply to procure his freedom, he is not thereafter debarred from maintaining such an action.—*Smith v. Markensohn*, R. I., 69 Atl. Rep. 311.

85. **Marriage**—**Liabilities of Parties to Illegal Marriage**—Where the testator, with his wife living, entered into a marriage contract with plaintiff, plaintiff had a good cause of action against the testator for the injury he had caused her in marrying her while his wife was living.—*Colt v. O'Connor*, 109 N. Y. Supp. 689.

86. **Master and Servant**—**Contributory Negligence**—If a servant, 16 years of age, though uninstructed as to the use of a dangerous machine by his master, knows enough about the machine to apprehend the danger from its use by him, any negligence on his part in operating it will be a bar to his recovery for injuries therefrom.—*Marklewitz v. Olds Motor Works*, Mich., 115 N. W. Rep. 999.

87.—**Contributory Negligence**—Where an employee willfully encounters danger known to him or open to be seen by him, he cannot recover for injuries caused thereby.—*Priddy v. Black Betsey Coal & Mining Co.*, W. Va., 61 S. E. Rep. 163.

88.—**Fellow Servants**—Where an assistant metal press operator was injured by the negligence of the operator in prematurely lowering one of the dies of a press, such assistant and the operator were fellow servants, precluding a recovery for injuries resulting from the operator's negligence.—*Ladiew v. Sherwood Metal Working Co.*, 109 N. Y. Supp. 477.

89.—**Personal Services**—A person hiring out to do legal editorial work held not an independent contractor even if not an ordinary servant.—*Edward Thompson Co. v. Clark*, 109 N. Y. Supp. 700.

90.—**Right to Invention of Servant**—A contract of employment by which the servant agreed that all machinery, tools, and devices invented by him during his employment should belong to the employer held to include certain devices which the servant secretly invented at home during such term.—*Detroit Lubricator Co. v. Lavigne Mfg. Co.*, Mich., 115 N. W. Rep. 988.

91. **Mortgages**—**Construction of Terms**—The words "prior to maturity" in an agreement executed contemporaneously with a mortgage held to mean a time prior to the election of the mortgagee to declare the entire debt due for default in part payment thereof.—*Bartlett Estate Co. v. Fairhaven Land Co.*, Wash., 94 Pac. Rep. 900.

92.—**Easements**—An easement over mortgaged property should not be established by subsequent acquiescence of the owner so as to bind a grantee of property claiming title under foreclosure of the antecedent mortgage.—*Teachout v. Duffus*, Iowa, 115 N. W. Rep. 1010.

93. **Municipal Corporations**—**Assessments for Local Improvement**—A statute levying assessments for local improvements on the value of the property or on the benefits derived is not unconstitutional.—*Kirst v. Street Improvement Dist. No. 120*, Ark., 109 S. W. Rep. 526.

94.—**Care Required as to Condition of Streets**—A city assuming to improve a street and put it in condition for travel is under the legal duty of seeing that the street is under all ordinary circumstances kept in a reasonably safe condition.—*Larsen v. City of Sedro Woolley*, Wash., 94 Pac. Rep. 938.

95.—**Liabilities for Torts**—A municipal corporation is not, as a general rule, liable for tortious injuries to the property of individuals when engaged in the performance of public or governmental functions.—*Heape v. Berkeley County*, S. C., 61 S. E. Rep. 203.

96.—**Obstruction of Street**—The presence of vehicles held not a temporary obstruction of a street within a municipal ordinance requiring vehicles to drive at the right of the center of the street, unless the street is temporarily obstructed.—*State v. Larrabee*, Minn., 115 N. W. Rep. 948.

97. **Negligence**—**Natural and Probable Consequence**—Negligence does not depend upon whether the result of the act might reasonably have been foreseen; it being sufficient to support the charge of negligence, if the result of the act is natural, though not inevitable, or if ordinary prudence would suggest that the act or omission would probably result in injury.—*Haase v. Morton & Morton*, Iowa, 115 N. W. Rep. 921.

98.—**Questions for Jury**—What course of conduct ought to be pursued by one to meet the requirement of ordinary care and prudence in a certain situation is a jury question; and courts will rarely assume to say that the conduct is or is not negligence.—*International & G. N. R. Co. v. Vallejo*, Tex., 108 S. W. Rep. 1187.

99.—**Res Ipsa Loquitur**—The falling of a sign by which plaintiff was injured held prima facie evidence of the owner's negligence, but he could show that he was not negligent for the reason that the sign had just been put up by a competent man upon whom he relied.—*McNulty v. Ludwig & Co.*, 109 N. Y. Supp. 703.

100. **Officers—Resignation.**—Where a meeting of a portion of the electors of a town had no authority to accept the resignation of an officer, the officer might subsequently withdraw the resignation and continue to hold the office, notwithstanding the election of a successor.—*State v. Stickley*, S. C., 61 S. E. Rep. 211.

101. **Partnership—Apparent Authority of Agent.**—Plaintiff having dealt with defendant's agent under a written power of attorney signed by the firm of which defendant was a partner, he could not rely on the implied power of the agent as a partner, but was confined to the express authority contained in the written power.—*Taylor v. Sartorius*, Mo., 108 S. W. Rep. 1089.

102. **Liabilities as to Third Persons.**—It is fundamental that each partner is the agent of the firm while engaged in the prosecution of the partnership business, and that the firm is liable for the torts of each, if committed within the scope of the agency.—*Haase v. Morton & Morton*, Iowa, 115 N. W. Rep. 921.

103. **Right of Partners to Attend to Individual Interests.**—A member of a law firm has a right to attend to his individual interests having no connection with the practice of his profession, and, unless such action takes his attention or his time so as to materially interfere with his professional duties, his partner cannot complain.—*Roth v. Boies*, Iowa, 115 N. W. Rep. 930.

104. **Pledges—Warehouse Receipt.**—The delivery of a warehouse receipt by a warehouseman, licensed to do business under Laws 1901, p. 180, c. 41 (Rev. Codes 1905, Secs. 2262, 2272), on property owned by him to his creditor as security for the debt, held to operate as a pledge without actual change of possession, rendering the surety on the warehouseman's bond liable for the safe-keeping of the property.—*State v. Robb-Lawrence Co.*, N. D., 115 N. W. Rep. 846.

105. **Principal and Agent—Constructive Notice.**—The doctrine of constructive notice has no application where the parties relying on it are the agents themselves and others who had agreed with them that the agents were not to communicate the facts to the principal.—*Traders' & Truckers' Bank v. Black*, Va., 60 S. E. Rep. 743.

106. **Power of Attorney.**—The fact that blank spaces are left on a written power of attorney does not render the principal liable, if the spaces are subsequently filled in by the agent so as to extend his authority.—*Taylor v. Sartorius*, Mo., 108 S. W. Rep. 1089.

107. **Principal and Surety—Assignment of Contract.**—The lessor of a railroad held entitled to recover against the lessee the amount of a judgment and costs recovered against it on the lessee's refusal to receive performance of a contract made by the lessor and assigned to the lessee.—*Atlantic & N. C. R. Co. v. Atlantic & N. C. Co.*, N. C., 61 S. E. Rep. 185.

108. **Discharge of Surety.**—Where persons signed a note as sureties on condition that the signature of another would be procured, failure to procure such signature absolved them from liability.—*Bank of Benson v. Jones*, N. C., 61 S. E. Rep. 193.

109. **Liability of Surety.**—The sureties on a bond executed by a bank to save a county treasurer harmless as to loss of deposits are not liable for any defalcation occurring before they assumed the obligation to the county or its treasurer.—*Fremont County v. Fremont County Bank*, Iowa, 115 N. W. Rep. 925.

110. **Public Lands—Limitation of Action.**—An alienee of a grantor of public land must give notice to the local land office of his interest to entitle him to notice of proceedings against his grantor.—*Eastern Banking Co. v. Lovejoy*, Neb., 115 N. W. Rep. 857.

111. **Quietting Title—Proceedings and Relief.**—In an action by a corporation to quiet its title to certain land, a provision for liquidated damages in case of a breach of a contract held not to apply to the matter in issue so as to prevent a recovery by plaintiff.—*Thompson-Spencer Co. v. Thompson*, Wash., 94 Pac. Rep. 935.

112. **Railroads—Injury to Child on Track.**—A fireman on a moving train who sees a child approaching it is bound to act promptly to prevent its injury.—*International & G. N. R. Co. v. Vallejo*, Tex., 108 S. W. Rep. 1187.

113. **Replevin—Counterclaims.**—Where a defendant seeks damages for the taking of property replevied in a suit in the circuit court, in order to recover damages, he must file a counterclaim for the same.—*Gurley Bros. v. Bunch*, Mo., 108 S. W. Rep. 1109.

114. **Sales—Fraud.**—As a general rule, a party defendant in a suit in equity may avail himself of every legal defense not inequitable in its nature; and, where personal property is sold by fraudulent representations, the defense of fraud is not inequitable.—*Smith v. Werkheiser*, Mich., 115 N. W. Rep. 964.

115. **Fraudulent Representations.**—Where defendants sold complainants a newspaper by fraudulent representations, the latter may recover the damages resulting from the fraud in an action at law, or may recoup such damages in a suit by the sellers, or their assignees, for the balance of the purchase price.—*Smith v. Werkheiser*, Mich., 115 N. W. Rep. 964.

116. **Specific Performance—General Warranty.**—Where a vendee took a decree vesting his vendor's title in him, it would be assumed that the vendee thereby waived performance, in so far as the contract required a conveyance with general warranty and an abstract of title.—*Jasper v. Wilson*, N. M., 94 Pac. Rep. 951.

117. **Statutes—Construction of Foreign Statute.**—The rule relating to the construction of a foreign statute on its adoption by the Legislature held to govern when only the substance of the foreign statute or some controlling word thereof has been adopted.—*State v. Miles*, Mo., 109 S. W. Rep. 955.

118. **Street Railroads—Boarding Street Cars.**—A passenger of a street car held not negligent as a matter of law in taking a certain position preparatory to boarding the car, from which position she was pushed under the car by the crowd behind her.—*Cousineau v. Muskegon Traction & Lighting Co.*, Mich., 115 N. W. Rep. 987.

119. **Care Required.**—A motorman in operating a street car through the thickly settled part of a city must keep a lookout for pedestrians traveling on intersecting streets.—*Remillard v. Sioux City Traction Co.*, Iowa, 115 N. W. Rep. 900.

120. **Wills—Construction.**—A will construed, and held to give a vested interest in the property to the devisees on testator's death; the enjoyment being postponed until a younger son, became of age, and the transfer of a devisee's interests after testator's death, but before such event, conveyed a good title.—*Ross v. Ayhrhart*, Iowa, 115 N. W. Rep. 906.

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EXCESSIVE ALLOWANCES TO RECEIVERS OF DEFUNCT BANKING INSTITUTIONS A REPROACH TO THE ADMINISTRATION OF JUSTICE.

It has been on our mind for some time to sound a note of warning to courts in reference to a matter which has had a strong tendency to embitter the public mind against both courts and lawyers. We refer to the excessive allowances made by some courts to receivers of defunct banking institutions and their attorneys.

We direct attention to receiverships of banking institutions only for the reason that in such cases the allowances are more excessive and the people interested in the results are depositors as well as ordinary commercial creditors and the hardships entailed are greater and more general. The same observations, however, can apply with equal force to other receiverships.

We saw an opportunity to revert to this discussion when our attention was called to the case of *People v. Knickerbocker Trust Company*, 111 N. Y. Supp. 2.

The defendant in this case, The Knickerbocker Trust Company, was the great banking institution of New York City upon which the notorious and spectacular raid was made by thousands of depositors last spring and whose failure besides involving thousands of small depositors in New York was the harbinger of the recent panic. This failure was one of the most disastrous in all the annals of bank failures. Widespread suffering resulted and the people interested naturally watched the proceedings with jealousy and suspicion. And well they did as the facts in the principal

case indicate a most reprehensible understanding between the directors and the receivers to permit the latter to exact excessive fees for their services.

The amount demanded by the receivers and agreed to by the attorneys representing the directors was seventy-five thousand dollars for each of the three receivers appointed and seventy-five thousand dollars for counsel who represented them, or a total of three hundred thousand dollars of money belonging to widows and orphans and to hard-working men and women of small means! The lower court, unobservant as such courts usually are in such matters and hearing no objection from those whose duty it was to object, entered the order making the allowance as stipulated between the parties.

The state, a party to the proceeding for the dissolution of the company, appealed the case. Other questions were before the court on appeal and not one of the parties seriously considered that the amount of the allowances made was a question on which the court would desire to pass, being satisfied that the court below had acted wisely within its discretionary powers in the premises. But Justice Gaynor, one of the greatest judges on the New York Supreme Bench, Appellate Division, startled both the receivers and their attorneys by singling out *sua sponte* the amount of the allowance and making that the main issue in the case.

The strong terms of condemnation used by Justice Gaynor in setting aside these allowances will sound strange to many lawyers who consider it proper to exact excessive fees for their own services and to recommend equally outrageous allowances for receivers whom they represent and should go ringing through the land as a note of warning against judicial extravagance in the handling of other people's money which happens for the time being and for one reason or another to be *in custodia legis*.

After dismissing the other points in the

case with a single, short paragraph, the learned judge, who wrote the opinion, proceeded as follows: "But the amount allowed for compensation and expenses in this proceeding was so grossly excessive as to amount to a spoliation of the assets of the trust company, and the order must be reversed or else modified for that reason. To allow it to stand would implant general distrust of the administration of justice. The temporary receivers served for only five months. The allowance of \$75,000 to each for compensation, and the same sum to their counsel, in all the great sum of \$300,000, is so disproportionate as not to wear the appearance of unhampered judicial discretion and judgment, but of having been arranged by agreement between the temporary receivers and the directors of the trust company, and adopted by the court inadvertently, or without the exercise of its controlling judgment and discretion. This also appears from the peculiar form of the order, viz., that the sums fixed should be paid provided the trust company consented, which its officers promptly did. Inasmuch as the trust duty of the directors of the trust company is to be diligent to have these charges upon the funds of the trust company fixed as low as possible, it seems strange that they should send counsel here to argue in favor of the compensation as fixed below. It imparts a strange moral aspect to the case, to say the least. It is urged that the court should not assume a paternal supervision over the directors of the trust company, but should be satisfied with or let pass what they are willing to do in the premises; but if there could be any force at all in such a suggestion in any case, this is not such a case. We deem it our duty to exercise our judgment and discretion in the reduction of the amounts fixed to a proper sum. It is not difficult for a court to see what the compensation should be without the aid of a reference. The order is modified by reducing the compensation of each temporary receiver from \$75,000 to \$20,000, and that of counsel

from \$75,000 to \$20,000, and as so modified it is affirmed."

Does not this language stir the very soul of man? Does not the action of this appellate tribunal in New York City in reaching out after apparently undetected extravagance, inspire renewed confidence in the watchfulness of even our appellate judiciary in circumventing excessive judicial charges and expenses? The widow and the orphan and the hard-fisted man of toil would have found it hard to believe that three receivers and one lawyer should receive three hundred thousand dollars of their hard earned savings for five months work, and to have allowed it to stand would, in the language of Justice Gaynor, have implanted "general distrust of the administration of justice." Such distrust has already been implanted in many jurisdictions which cannot boast a judiciary as watchful as the court in the principal case and who accede to the demands of lawyers and receivers without comment or objection. We are hopeful, however, that trial courts all over the land will soon awake to the fact that if they desire to retain the confidence of the people they must not accede to a receiver's demands for allowances for their services which are "so disproportionate as not to wear the appearance of unhampered judicial discretion and judgment."

NOTES OF IMPORTANT DECISIONS

APPEAL AND ERROR—PRESUMPTIONS ON APPEAL IN SUPPORT OF THE JUDGMENT.—The Court of Appeals of California, has jumped from one side to the other side of the same question when in the recent case of *Lunnun v. Morris*, 95 Pac. 907, they held in the first opinion in that case that in support of a judgment all proceedings necessary to its validity will, on appeal, be presumed to have been regularly taken, and on rehearing held that an appellate court could no more assume that error appearing therein was cured by some matter which is not contained in the bill of exceptions than it could consider matters out-

side of the judgment roll for the purpose of impeaching the correctness of the judgment.

The facts in this case which occasioned the court so much embarrassment were these: The plaintiff's attorney failed to take a default against the defendant after the time had gone by for filing an answer. Just preceding the hearing on the case defendant filed his answer. Attorneys for defendants thereupon called the attention of the court to the filing of the answer and objected to the introduction of any testimony for the reason that the case was at issue, and had not been regularly set for trial and that they had no notice of trial under section 594 of the Code of Civil Procedure. Plaintiff asked that the default of defendants be entered, and that the testimony of plaintiff's witnesses be heard, upon the ground that the time for the filing and serving of said answer had expired before the same had been filed. Defendants then asked leave of the court to prepare motion, affidavits, etc., upon an application to be relieved from the failure to serve and file their answer within the time allowed by law, on the ground of mistake, inadvertence, and excusable neglect of defendants' counsel. By consent, the attorney for defendants made a statement in open court of the facts upon which he based said motion for relief and introduced the verified answer as an affidavit of merits. His statement was accepted as true for the purpose of the motion, and, together with said answer, appears in the bill of exceptions in the record. The evidence on behalf of plaintiff in the cause was then heard and the objection and motion of defendants taken under submission, and thereafter, on the 2d day of January, 1907, the objection was overruled and the motion denied. Judgment by default in favor of plaintiff for the recovery of the premises was filed January 5, 1907, and the recital in this judgment shows that it was made upon a hearing had on December 31, 1906, at which time evidence was introduced on behalf of plaintiff. The above-mentioned appearance of defendants, the extension of time to plead, and their failure to answer within said time are recited in the judgment.

On appeal the question was whether the trial court on its own motion or on motion of plaintiff had stricken defendant's answer from the file before default was entered, for, otherwise, the action of the court would have been invalid under the general rule that a default should not be entered until the answer shall have first been stricken from the files. See 6 Ency. Pl. & Pr. pp. 82, 85.

The argument on appeal by the respondent was that the law would presume that the answer was stricken from the files before default was entered in the absence of any contrary

showing in the bill of exceptions. The court or appeal adopted this view on the first hearing, using this language: "There is nothing in the bill of exceptions to show that any motion was made to have the answer stricken from the files, nor does it appear that the court of its own motion did this. Neither is there anything in the record to negative this; that is, to show that no such motion was made or that such action was not taken. The bill of exceptions contains merely the recital that "the following proceedings were had therein." It nowhere appears that the proceedings displayed and the action taken were all the proceedings had or acts done. In the absence of such showing, the presumption must be in favor of the court having done every act necessary to sustain the judgment. In support of the judgment all proceedings necessary to its validity will be presumed to have been regularly taken, and any matters which might have been presented to the court below, which would have authorized the judgment, will be presumed to have been thus presented, if the record shows nothing to the contrary. *Von Schmidt v. Von Schmidt*, 104 Cal. 547, 38 Pac. 361."

We do not see why the court should have changed its position on this question. The bill of exceptions is the statutory record as distinguished from the pleadings and judgment which constitute the mandatory record. No statute can amalgamate these two records so as will raise the one to the dignity of the other or lower the superior importance of the one to the level of the other. The judgment is the supreme event in any judicial proceeding and all other events are presumed to shape themselves in conformity to this supreme attainment unless the contrary appear. To make the validity of a judgment depend on affirmative showing in the bill of exceptions, whose main purpose is simply to advise the appellate courts of errors committed by the trial court to which exceptions have been duly taken, that every minute detail of the trial has proceeded in its proper order, is out of the question and violates all principles of procedure. The authorities are almost unanimous to the contrary. 2 Cyc. p. 266, is the beginning of a discussion of a subdivision under the general title of appeal and error, entitled "Presumptions and Interferences upon the Record," which shows the tendency of the appellate courts to exalt the judgment and to multiply the presumptions of regularity to such extent that only the absence of the most essential requisites in the bill of exceptions will invalidate a judgment. On page 275, the learned author says: "The judgment appealed from is presumed to be right until, by an affirmative showing on the record, the contrary is estab-

lished. It follows, therefore, that every reasonable intendment and presumption will be resolved against the appellant and in favor of the correctness of the proceedings below." Numerous illustrations are given of the wide extent of this presumption in upholding the judgment and in requiring an affirmative and not a negative showing from the record itself that the necessary steps to sustain the judgment were not taken or were not taken in their proper order, before the judgment will be reversed.

THE STANDARD OIL REBATE CASE.

Is there a distinction in principle between the violation of a statute forbidding the sale of intoxicating liquor to a minor and the violation of the act of congress, forbidding the giving or accepting rebates or concessions in the transportation of goods? While it is conceded that in the former case the saloon keeper's ignorance of the age of the minor is no defence to a prosecution for the sale of intoxicating liquor to a minor, yet it is held by the U. S. Circuit Court of Appeals in the Standard Oil Rebate Case, that a shipper cannot be convicted for accepting a concession from the lawful published rate, unless it is shown that such shipper actually knew what the lawful published rate was and in accepting a less rate did so knowingly and intentionally.

Statutes prohibiting the sale of intoxicating liquor are of various kinds. They may prohibit the sale without a license—sales to a minor—sales to an habitual drunkard—sales on Sunday. None of these statutes use the word "knowingly" or "intentionally." The saloonkeeper may honestly believe that a customer is of full age, that he is not an habitual drunkard and, if his clock is slow, that the sale is made before 12 o'clock Saturday night. Again, a druggist may honestly believe that he sells only drinks that are not intoxicating—so-called "temperance drinks."

It is the purpose of this communication to show that the underlying principle which sustains the decisions in intoxicating liquor cases has been applied in a variety of other

cases, and has become a well established rule. It may be stated as follows: Where a statute, without any reference therein to any knowledge or intent, penalizes as crime an act, which in the absence of the statute would be legal, ignorance or mistake of fact is no defence for one who voluntarily does the prohibited act.

In *Commonwealth v. Boynton*,¹ the principle is stated by the Supreme Court of Massachusetts as follows: "Where the act is expressly prohibited, without reference to the intent or purpose, and the party committing it was under no obligation to act in the premises unless he knew that he could do so lawfully, if he violates the law he incurs the penalty." In that case the defendant, indicted for selling intoxicating liquor, offered evidence to prove that he had no reason to suppose that the article sold was intoxicating, that he bought it for beer which was not intoxicating, and did not believe it to be intoxicating. The court says, "if the defendant purposely sold the liquor, which was in fact intoxicating, he was bound at his peril to ascertain the nature of the article which he sold. * * * The salutary rule that every man is conclusively presumed to know the law is sometimes productive of hardship in particular cases; and the hardship is no greater where the law imposes the duty to ascertain the fact."²

This salutary rule was followed in a case where the defendant offered to prove that the wholesale dealer from whom he bought the liquor (a kind of cider) "represented and guaranteed that it contained no alcohol and would not intoxicate." The

(1) 2 Allen, 160.

(2) The following cases are to the same effect: *Commonwealth v. Goodman*, 97 Mass. 117; *Com. v. Hallett*, 103 Mass. 452; *Com. v. Savery*, 145 Mass. 212, 13 N. E. 611; *Com. v. Daly*, 148 Mass. 428, 19 N. E. 209; *Com. v. O'Kean*, 152 Mass. 534, 26 N. E. 97; *Byars v. Mt. Vernon*, 77 Ill. 467; *Noecker v. People*, 91 Ill. 494; *King v. State*, 66 Miss. 502, 6 So. 188; *State v. Hughes*, 16 R. I. 403, 16 Atl. 911; *Carl v. State*, 89 Ala. 93, 8 So. 156; *Compton v. State*, 95 Ala. 26, 11 So. 69; *State v. Moulton*, 52 Kan. 69, 34 Pac. 412; *Peters v. District Court*, 114 Iowa 207, 86 N. W. 300; *State v. Eaton*, 97 Me. 289, 54 Atl. 723.

court says: "Numerous authorities could be cited to the effect that where a statute commands that an act be done or omitted, which in the absence of such statute might have been done or omitted without culpability, ignorance of the fact or state of things contemplated by the statute will not excuse violation."³

In a case where the defendant was indicted for furnishing a glass of spirituous liquor to an habitual drunkard, contrary to the statute, the Supreme Court of Minnesota say: "When, without reference to the intent, the statute forbids the doing of an act in certain circumstances, and a party is under no obligation to do it, unless he knows it to be lawful, if he does the forbidden act he violates the law, irrespective of his knowledge or ignorance of the circumstances mentioned."⁴

In *State v. Moulton*,⁵ the Supreme Court of Kansas say: "When the commission of an act is made a crime by statute; without any express reference to any intent, then the only criminal intent necessarily involved in the commission of the offense is the intent to commit the interdicted act; and in such a case it is not necessary to formally or expressly allege such intent, or any intent, but simply to allege the commission of the act, and the intent will be presumed." And in *State v. Tomasi*,⁶ the Supreme Court of Vermont say: "If to constitute an offense, knowledge of certain facts is essential, it must invariably be shown that the respondent has such knowledge, but if a statute makes an act penal, without reference to knowledge, it is then unnecessary to show it, and ignorance of the fact is no defense. The rule may be stated in other words, thus: If a statute commands that an act be done or omitted, which in the absence of the statute would be blameless, ignorance of the fact or state of things contemplated by the statute will not excuse its violation."

(3) *Haynes v. State*, (Tenn.), 105 S. W. 251.

(4) *State v. Heck*, 23 Minn. 549; see also *Com. v. Zelt*, 138 Pa. St. 615, 21 Atl. 7; *State v. Farr*, 34 W. Va. 84, 11 S. E. 737.

(5) 52 Kan. 69, 34 Pac. 412.

(6) 67 Vt. 312, 31 Atl. 780.

This is a well settled rule and applies to other than liquor cases. The rule was applied where the defendant was indicted for selling adulterated milk. He contended that the commonwealth should have been held to prove on the trial that he committed the offence knowing the milk to be adulterated. But the court said: "The language of the statute does not require such proof; and it is evident that the legislature did not intend that it should do so. * * * It is of the greatest importance that the community shall be protected against the frauds now practiced so extensively and skilfully in the adulteration of articles of diet by those who deal in them, and if the legislature deem it important that those who sell them shall be held absolutely liable, notwithstanding their ignorance of the adulteration, we can see nothing unreasonable in throwing this risk upon them. It is the same risk which every man takes who sells intoxicating drinks; the law making him liable to the penalty, although it is not proved that he knew that the liquors were intoxicating."⁷

In a New York case for the violation of a similar statute, the court of appeals say: "As the law stands, knowledge or intention forms no element of the offense. The act alone, irrespective of its motive, constitutes the crime. * * * It is notorious that the adulteration of food products has grown to proportions so enormous as to menace the health and safety of the people. Ingenuity keeps pace with greed, and the careless and heedless consumers are exposed to increasing perils. To redress such evils is a plain duty, but a difficult task. Experience has taught the lesson that repressive measures which depend for their efficiency upon proof of the dealer's knowledge and of his intent to deceive and defraud, are of little use, and rarely accomplish their purpose. Such an emergency may justify legislation which throws upon the seller the entire responsibility of the purity and soundness of what he sells, and

(7) *Commonwealth v. Farren*, 9 Allen, 489.

compels him to know and to be certain."⁸

So in the case of a prosecution under a statute forbidding the adulteration of food, the Supreme Court of Ohio held that ignorance of the adulteration was no defense. The court say: "If knowledge of the adulteration were an element of the offense, it would be incumbent upon the state to establish it; but, since it is not, the defendant could derive no advantage from any evidence tending to show the absence of such knowledge."⁹

In *Commonwealth v. Emmons*,¹⁰ it was held that, to sustain a complaint on a statute against the keeper of a billiard room for admitting a minor thereto without written consent of his parent or guardian, it is not needful to aver or prove guilty intent of the defendant. In that case the defendant offered evidence, which the judge excluded, that when the minor came to the room the defendant asked him whether or not he was a minor, saying that, if he was so, he must not enter, and the minor replied that he was of full age. So in *Commonwealth v. Wentworth*,¹¹ it was held that guilty knowledge is not one of the ingredients in the offence created by a statute, imposing a penalty upon any person who shall sell, or keep, or offer for sale, naptha under any assumed name. The Court say: "We are of opinion that the court correctly ruled, that the question whether the defendant had knowledge that the article kept by him was naptha was immaterial. The statute does not make a guilty knowledge one of the ingredients of the offence."

The rule has been applied even to cases of bigamy. A second marriage is legal in the absence of any prohibitory statute. But where a statute penalizes a second marriage when a former husband or wife is living, unless he or she has been absent and unheard of for a term of seven (in some states five) years, an honest and reasonable

belief in the death of the former husband or wife is not a defence to a prosecution for bigamy.¹² In another bigamy case the court held: Where a statute forbids the doing of a certain thing, and is silent concerning the intent, with which it is done, a person who does the forbidden act is not guiltless because he has no wrongful intent beyond that which is involved in the doing of the prohibited act.¹³

And the rule has been applied generally to cases coming within its scope without reference to the nature or character of the act penalized as crime. Thus where a statute made it a criminal offense to sign a certificate of nomination in another's name, the fact that a defendant to a prosecution thereunder entertained no criminal intent, and thought he had a right to do so, was held to be no defense. The court say: "No fraudulent intent is necessary to constitute the offense. It is immaterial that the defendant did not intend to break the law. It is enough that he did the things made offenses by the statute."¹⁴ So where a statute made it a penal offense to remove growing timber from school lands belonging to the state, the Supreme Court of South Dakota say: "Neither the term 'knowingly' nor any term of similar import, is found in the section. The doing or the attempting to do the act prohibited constitutes the offense. The object evidently sought to be accomplished by the statute, is the protection of the standing timber and wood upon the public lands of the state. Hence every person is charged with the duty of ascertaining, at his peril, that the lands from which he attempts to remove standing or growing timber or wood is not

(8) *People v. Kibler*, 106 N. Y. 321, 12 N. E. 795.

(9) *State v. Kelly*, 54 Ohio St. 166, 43 N. E. 163.

(10) 98 Mass. 6.

(11) 118 Mass. 441.

(12) It was so held in the following cases: *Com. v. Mash*, 7 Met. 472; *Com. v. Hayden*, 163 Mass. 457, 40 N. E. 846. In these cases the court says: "It was not the intention of the law to make the legality of a second marriage whilst the former husband or wife is in fact living, depend upon ignorance of such absent party's being alive, or even upon an honest belief of such person's death."

(13) *State v. Zichfeld*, 23 Nev. 304, 46 Pac. 802; see also *Gordon v. Gordon*, 141 Ill. 160; *State v. Westmoreland*, 76 S. Car. 145, 56 S. E. 673.

(14) *Com. v. Connelly*, 163 Mass. 539, 40 N. E. 862.

public lands of the state. The case comes clearly within the principle decided by this court in *State v. Sasse*,¹⁵ (a liquor case) and is ruled by that decision."¹⁶ So where a statute made it a felony to enter on state tax homestead lands and cut timber therefrom it was held by the Supreme Court of Michigan that the offense is complete under the statute, although there is no intention to commit trespass. The defendant claimed that he relied upon a quitclaim deed from some third person, without any examination of title. The court say: "If the contention of the respondent be sustained, the statute is of little worth; because anyone can purchase a quitclaim deed, which of itself is suspicious, and say he acted in good faith. It is just as competent for the legislature to make an act of trespass criminal as it is to make the opening of a saloon per se criminal. The saloon keeper is responsible for the acts of his bartender, though he be ignorant of the act. The power of the legislature to do away with intent in such case is undoubted."¹⁷

In *State v. Huff*¹⁸ it was held by the Supreme Court of Maine that evidence is not admissible to show in criminal prosecution that the defendant is innocent of turpitude, when the statute makes the act charged an illegal one, without reference to the intent of the doer. There the defendant was charged with doing the acts prohibited by special statute enacted for the protection of smelts in the Damariscotta River. He offered to show that in doing those acts, he acted in good faith not intending to violate any law. The trial court ruled out this offered defense, and the defendant was convicted. The supreme court sustained the ruling, citing *State v. Goodenow*.¹⁹

The rule was also applied where the de-

fendant drove sheep from a county where scab was epidemic among sheep, contrary to a legally authorized proclamation, and it was offered to show the absence of wrongful intent on the part of the defendant.²⁰ Again in *Garver v. Territory*,²¹ it was held that where the intent to commit the act charged in an indictment is not necessarily an ingredient of the crime, as defined by the statute, than the fact that the act may have been committed under an ignorance or mistake of fact is no defense to the crime charged.

Under a statute making the holder of a junior mortgage or lien liable, if he disposes of the property without providing for the payment of the prior mortgage or lien, the court say: "It will be observed that this statute, unlike many other penal statutes, contains no language implying that the act forbidden must be done willfully or maliciously, or with intent to defraud, in order to make it criminal; but it simply forbids the doing of a certain act, without any words of qualification whatsoever, and in the absence of any such words the court has no power to supply them." It was held that there was no error on the part of the circuit judge in saying to the jury that "the motive and intent is not a matter of inquiry. It is the act."²²

So under a statute punishing any public officer for neglecting to turn over money in hand to his successor within a specified time, it was held that the offense consists in the commission to perform an official duty, and that the motive and intent with which such offence is committed is immaterial.²³

The federal courts also have hitherto recognized the rule as of general application. Thus in *United States v. Leathers*,²⁴

(15) 6 S. Dak. 212. 60 N. W. 853.

(16) *State v. Dorman*, 9 S. Dak., 528. 70 N. W. 848.

(17) *People v. Christian*, 144 Mich. 247, 107 N. W. 919, citing a liquor case, *People v. Longwell*, 120 Mich. 311. 79 N. W. 484.

(18) 89 Me. 521; 36 Atl. 1000.

(19) 65 Me. 30.

(20) *State v. Keller*, 8 Idaho, 699. 70 Pac. 1051.

(21) 5 Okl. 342. 49 Pac. 470.

(22) *State v. Reeder*, 36 S. Car. 497, 15 S. E. 544, 546.

(23) *State v. Assmann*, 46 S. Car. 564; 24 S. E. 673. These cases are cited and followed in *State v. Westmoreland*, 76 S. Car. 145; 56 S. E. 673.

(24) 6 Sawyer, U. S. 17.

it was held by the U. S. District Court of Nevada that where the statute contains nothing requiring acts to be done knowingly, and the acts are not *malum in se*, nor infamous, but only wrong because prohibited, a criminal intent need not be proved. The offender is bound to know the law, and obey it, at his peril. There the defendant was charged with trading in the Indian country without a permit contrary to the statutes of the United States, and found guilty, although he sincerely believed that his trading post was outside the lines of the Indian Reservation. The district judge in his opinion says: "The statute contains nothing requiring these acts to be done knowingly. The acts themselves are not *malum in se*. The object of the law is not to punish men for those acts as crimes so much as to prevent trading and intercourse with the Indians otherwise than the law permits. There is nothing infamous in the punishment prescribed. Under these circumstances I think it is immaterial with what intent the acts were done. They belong to that class of acts which, in the absence of the statute, might be done without culpability, and being such, ignorance of the lines of the reservation will not excuse, nor will a sincere belief by the defendant that he is outside the lines. He is bound to know the facts and obey the law at his peril."

In *United States v. Bayaud*,²⁵ where the defendant was indicted under a statute forbidding the removal of the stamp from a package of distilled spirits without, at the same time, destroying it, the U. S. Circuit Court, S. D., New York, (Wallace, Benedict and Brown, J. J.), say: "Statutory crimes where knowledge or intent are not ingredients of the offense are common. The rule applied in such cases is that where a statute forbids the doing of a certain act under certain circumstances, without reference to knowledge or intent any person doing the act mentioned is charged with the duty to see that the circumstances attending this

act are such as make it lawful; and under such statutes a conviction may be had upon proof of doing the forbidden act, without proof of knowledge by the accused of the circumstances specified in the statute."

And in *New England Dredging Co. v. United States*,²⁶ where there was a proceeding under a Federal statute, prohibiting the deposit of refuse matter in any of the navigable waters of the United States, the U. S. Circuit Court of Appeals, (Colt, Putnam and Aldrich, J. J.), say: "The expressed object of resorting to the exercise of plenary power through arbitrary and exceptional remedies in such matters, is to better safeguard the public good in situations where the public good is easily subject to imposition and injury through heedless, inadvertent, or indifferent violations of laws enacted for the general welfare, and such remedies are enforced even in respect to certain of the lower statutory crimes and misdemeanors as well as in a limited class of cases involving civil conditions. Wills, J. in *Reg. v. Tolson*, 23 Q. B. Div., 168, 172, 173, in speaking of this exceptional and somewhat recent rule created to meet the demands of modern necessities and in describing the reasons for the rule and its scope, says: 'The acts are properly construed as imposing the penalty when the act is done, no matter how innocently, and in such a case the substance of the enactment is that a man shall take care that the statutory direction is obeyed, and that if he fails to do so he does it at his peril.' Again, the learned judge says: 'A statute may relate to such a subject-matter and may be so framed as to make an act criminal, whether there has been any intention to break the law or otherwise to do wrong or not. There is a large body of municipal law in the present day which is so conceived.'"

It is believed that the foregoing authorities fully sustain the proposition stated at the outset of this communication, to-wit: Where a statute, without any reference therein to any knowledge or intent, pen-

(25) 16 Fed. 376.

(26) 144 Fed. 932.

alizes as crime an act, which in the absence of the statute would be legal, ignorance or mistake of fact is no defense for one who voluntarily does the prohibited act.

The question arose in the Standard Oil Rebate Case whether or not this rule should prevail in the construction of the Act of Congress known as the Elkins law. It was followed by Judge Landis and ignored as a controlling rule by the Circuit Court of Appeals. That act provides that it shall be unlawful for any person or corporation "to offer, grant or give, or to solicit, accept or receive any rebate, concession or discrimination in respect of the transportation of any property in interstate or foreign commerce, * * * whereby any such property shall, by any device whatever, be transported at a less rate than that named in the tariffs published and filed by such carrier." The penalty for each offence under the act is a fine of not less than \$1,000.00 or more than \$20,000.00.

Prior to the enactment of this statute it was not illegal for the Standard Oil Company to solicit, accept or receive any rebate, concessions or discrimination for the transportation of its products. Under the practice of procuring such rebates, concessions and discriminations, large corporations were enabled to "wipe out" every competing, normal corporation having a smaller quantity of products for transportation. It was to prevent such evils in the commercial world that the Elkins law was enacted by Congress. This act penalized as crime such rebates, concessions and discriminations as allowed the shipper, to the prejudice of his competitors in business, to have his products transported at a less rate than that named in the tariffs published and filed by the carrier. No such word as "knowingly" or "intentionally" was incorporated by Congress in the definition of the crime. Can the Courts do it? It is probable that this question will not be regarded by the legal profession and the public generally as settled until it is finally passed upon by the Supreme Court of the United States.

R. M. BENJAMIN.

Bloomington, Ill.

SCHOOLS AND SCHOOL DISTRICTS— SUSPENSION OF PUPILS.

STATE v. DISTRICT BOARD OF SCHOOL DIST. NO. 1.

Supreme Court of Wisconsin, May 8, 1908.

The school authorities may suspend a pupil for an offense committed outside of school hours, and not in the presence of the teacher, which has a direct and immediate tendency to influence the conduct of other pupils while in the schoolroom, to set at naught the proper discipline of the school, to impair the authority of the teachers, and to bring them into ridicule and contempt.

The discretion of school authorities in government and discipline of the pupils is very broad, and the courts will not interfere with the exercise of such authority except when illegally or unreasonably exercised.

This is an action of mandamus commenced by the relator against the district board and G. J. Baker, principal of the high school of St. Croix Falls, to compel the reinstatement of two of relator's children who had been suspended by the principal. The petition, after the formal averments, states, in substance, that relator's two minor children had been continuous in their attendance upon the high school up to and including October 16, 1906, on which date they were suspended by the principal; that said suspension was illegal but had been ratified by the district board and still continued in force; that said children cannot be readmitted to said school "unless they should apologize with a falsehood;" that the alleged cause of suspension of said children was a harmless act by them and three other pupils of the high school, which occurred after the schools had closed to October 10, 1906, and not during school hours, or in the building where the school was maintained, or while said children were under the control of said principal; that at the request of a member of the senior class, who had written a harmless poem, being a take-off on the rules of the school, the offending pupils, who were younger and less experienced, took the writing to the office of a weekly newspaper published in the same village, and requested the publisher to print the same in his paper if there was nothing wrong in it; that the publisher, deeming the same harmless, published it in part of the next issue of the paper. The poem was printed as part of the petition, but it is here omitted. It is alleged that the deportment of the children in school had been good, and they had never violated any of the rules prescribed for its management. An alternative writ was issued on November 7, 1906,

based upon the petition, with supporting affidavits. The defendants in the return to the writ state, in substance, their belief that the publication of the poem in question in a public newspaper was detrimental to the interests of the school; that it not only tended to hold up said school, its discipline and its teachers to public contempt and ridicule, but it tended toward awakening in the minds of the pupils themselves a feeling of hostility toward the teachers and a defiance toward the proper control and management of the school; that after the offense had been committed the children were advised of the harmfulness of their conduct and required to apologize, and upon their refusal they were suspended; that their reinstatement without suitable apology would be detrimental to the interests of the school and subversive of proper discipline therein; wherefore they ask that the petition be denied.

The relator demurred to this return on November 14, 1906. Thereupon the court, as appears by recitals in the subsequent findings, appointed a referee with the consent of the attorneys for the respective parties to take and report the evidence relating to the precise grounds of suspension of relator's daughters, and the substance of what was said between the teachers and said pupils previous to and at the time of their suspension. The referee made his report on the 30th day of November, which contains the testimony of the principal and two of his associates and of three of the pupils, including the relator's children. The principal testified that after he learned that the relator's children had taken the poem to the printing office, "I then told them that their penalty is that you are suspended until you apologize and pay forty cents each." In the apology, "they were simply to admit that they did a wrong thing, that they were sorry for it, and if they came back to school they should promise to be obedient students." The other witnesses gave substantially the same testimony. Thereafter and on December 24, 1906, the court filed an opinion sustaining the action of the school authorities and in conclusion overruled the relator's demurrer to the return, and dismissed his motion for a peremptory writ of mandamus, with costs. There was no request made on behalf of the relator to withdraw the demurrer and to file an answer, and no formal application was made to amend the petition until after the entry of judgment. No further testimony was taken and on December 28, 1906, the court made and filed its findings in favor of the defendants, and directing the dismissal of the petition. From the judgment entered thereon,

bearing the same date, this appeal is taken. Thereafter and at a special term of said court, and on the 31st day of January, 1907, a petition theretofore filed on behalf of the relator, based on the evidence taken before the referee, asking leave to amend the petition by adding the words "and pay forty cents each," in their proper place, relating to the penalty imposed at the time of the suspension, came on to be heard, and was denied by the court. There was an exception to the order, but no appeal has been taken therefrom.

Bashford, J. (after stating the facts as above): We are not called upon to approve the practical wisdom displayed by the school authorities in dealing with the hasty conduct of thoughtless school children, prompted by an older mate, and abetted by the publisher of the paper, or to justify the strong resentment that must have prompted the relator in appealing to the courts for redress. The exercise of a little charity, forbearance, and good nature might have avoided the controversy, which must have been attended with more or less serious consequence to the suspended pupils as well as to the school and to the litigants here represented. But the cause is before us for decision, and must be treated like any other lawsuit.

The assignments of error relate to the power of the school authorities to suspend the offending pupils for the misconduct, which was established by the undisputed evidence. The authority to suspend the pupils from the privileges of the school is denied by the appellant, unless the offense was a violation of some rule prescribed by the board, or involved moral turpitude, or was committed during school hours in the schoolroom, or in the presence of the master and other pupils. In support of this proposition counsel refer to *Board of Education v. Purse*, 101 Ga. 422, 28 S. E. Rep. 896, 41 L. R. A. 593, 65 Am. St. Rep. 312, *Murphy v. Board of Directors*, 30 Iowa, 429, and *Dritt v. Snodgrass*, 66 Mo. 286, 27 Am. Rep. 343. The decision of the Georgia court has no direct application. It was there held that the school board might suspend children who had not been guilty of any violation of the rules of the school, but whose mother, undertaking to call in question the discipline of the teacher over one of the children, entered the schoolroom during school hours, and in the presence of the pupils there assembled used offensive and insulting language to such teacher. *Dritt v. Snodgrass*, supra, is readily distinguishable. There the school board had made a rule that no pupil should during the school term attend a social party, and a pupil by the permission of his parents violated the rule and was ex-

pelled. The court held that in prescribing the foregoing rule the board had gone beyond its power and invaded the rights of the parents. *Murphy v. Board of Directors*, 30 Iowa, 429, is directly in point, and supports the proposition stated by the appellant, but the decision is made to turn upon the extent of the power conferred by statute on boards of school directors. The statute provided that the directors should have power to dismiss pupils from school for gross immorality or for persistent violation of the regulations of the school; and it was also made their duty to aid the teacher in establishing and enforcing rules for the government of the schools. The words italicized are so written in the opinion as manifesting the power which may be exercised by the board. The plaintiff in that case was not charged with immorality or the violation of any regulation of the school. It is said in the opinion: "The statute does not authorize the board of directors to suspend pupils for acts tending to destroy the peace and harmony of the school, or in citing insubordination in others, or for ridicule of the directors, in the absence of any regulation prohibiting such acts." Section 439, St. 1898, confers broader power upon such boards; it authorizes them to make all rules needful for the government of the school, and to suspend any pupil for noncompliance with the rules made by themselves or by the teacher with their consent. But, it is urged that in the instant case no rule had been prescribed by the board or by the teacher relating to the misconduct complained of. But that contention is fairly met by the decision of this court in *State ex rel. Burpee v. Burton*, 45 Wis. 150, 30 Am. Rep. 706.

The case last cited was an action of mandamus to compel the reinstatement of a pupil in the school who had been guilty of misconduct, which was of itself not a violation of any rule prescribed by the board or by the principal. It is said in the opinion: "While the principal or teacher in charge of a public school is subordinate to the school board or board of education of his district or city, and must enforce rules and regulations adopted by the board for the government of the school, and execute all its lawful orders in that behalf, he does not derive all his power and authority in the school and over his pupils from the affirmative action of the board. He stands for the time being in loco parentis to his pupils, and because of that relation he must necessarily exercise authority over them in many things concerning which the board may have remained silent. In the school, as in the family, there exist on the part of

the pupils the obligations of obedience to lawful commands, subordination, civil deportment, respect for the rights of other pupils and fidelity to duty. These obligations are inherent in any proper school system, and constitute, so to speak, the common law of the school. Every pupil is presumed to know this law, and is subject to it, whether it has or has not been re-enacted by the district board in the form of written rules and regulations. Indeed it would seem impossible to frame rules which would cover all cases of insubordination and all acts of vicious tendency which the teacher is liable to encounter daily and hourly." While the offense for which the pupil was suspended is not stated in the *Burpee* Case, it was apparently committed in the schoolroom and in the presence of the teacher, and hence it may be urged that the two cases are distinguishable. We have been referred to no decision directly holding that the school authorities can suspend a pupil for misconduct after school hours, unless the offense is a violation of established rules, or is committed in the school-house, or upon the school grounds, or in the presence of the master and other pupils. There is abundant authority, however, that the school board or the teacher may make rules to govern the conduct of the pupils after school hours, and punish a violation thereof by suspension from attendance upon school. *Deekins v. Gose*, 85 Mo. 485, 55 Am. Rep. 387; *Hutton v. State*, 23 Tex. App., 386, 5 S. W. Rep. 122, 59 Am. Rep. 776; *Wayland v. Hughes* 43 Wash. 441, 86 Pac. Rep. 642, 7 L. R. A. (N. S.) 352; *Kinzer v. Directors*, 129 Iowa, 441, 105 N. W. Rep. 686, 3 L. R. A. (N. S.) 496; *Jones v. Cody*, 132 Mich. 13, 92 N. W. Rep. 495, 62 L. R. A. 160.

It is clear, therefore, that a rule might have been adopted by the school authorities to meet the situation here presented. This court in the quotation already made from the opinion in the *Burpee* case recognizes certain obligations on the part of the pupil, which are inherent in any proper school system, and which constitute the common law of the school, and which may be enforced without the adoption in advance of any rules upon the subject. This court therefore holds that the school authorities have the power to suspend a pupil for an offense committed outside of school hours, and not in the presence of the teacher which has a direct and immediate tendency to influence the conduct of other pupils while in the schoolroom, to set at naught the proper discipline of the school, to impair the authority of the teachers, and to bring them into ridicule and contempt. Such power is essential to the preservation of

order, decency, decorum, and good government in the public schools.

The school authorities considered the misconduct for which the pupils were suspended such as to have a direct and injurious effect upon the good order and discipline of the school. The relator's children were instrumental in causing the publication of the poem in a newspaper, which, supposedly, found its way into the homes of many of the children attending the high school, and who would be as much influenced thereby as if the writing had been printed and posted in the school-room, or there circulated and read. The teachers are especially familiar with the disposition and temper of the children under their charge, and the effect which such a publication would probably have upon the good order and discipline of the school. The school authorities must necessarily be invested with a broad discretion in the government and discipline of the pupils, and the courts should not interfere with the exercise of such authority unless it has been illegally or unreasonably exercised. The trial court has found that the act complained of does not evince an abuse of discretion on the part of the teachers, but rather an earnest desire to counsel, admonish, and discipline the pupils for their own good as well as for the good of the school. That conclusion is supported by the testimony and is here approved. This court is not called upon to decide as to the wisdom of the action of the school authorities, but only as to their jurisdiction within proper limits.

The judgment of the court below is affirmed.

NOTE.—*Right of School Boards to Suspend Pupils in Absence of any Specific Regulation for Breaches of Decency or Disrespect of School Discipline, Whether Committed Within or Outside of School Hours.*—Now that the school terms have opened and in view of the fact that we are fully persuaded, although we are not inclined toward pessimism, that the average small boy is no better than was the average small boy in the days when we went to school, we have concluded at this time to make use of the principal case to declare for the encouragement of school boards and school teachers and as a warning and admonition to obstreperous scholars, that the courts of the land have shown a recent tendency to enlarge the jurisdiction of the school authorities and to give them the right not only to punish infractions of the rules of the school committed in the teachers' presence but for violations of ordinary rules of decency or for disrespect of school authority, whether such rules are promulgated as expressed regulations or not, and whether such violations are committed within school hours or in the presence of the teacher or not.

This is the decision in the principal case, and to say that it is a step considerably in advance of the authorities is stating a self-evident proposition. The rule goes far beyond the contempt

privileges which courts enjoy for their own protection. The violation of school discipline is in the nature of a contempt. The punishment inflicted is not so much for the pupil's edification as to uphold the dignity of school authority. This indeed, is the same principle upon which courts summarily furnish offenders against their dignity as for contempt. But constructive contempts, that is, contempts committed outside of the presence of the court are only punishable when committed in relation to a case pending. A man may abuse the courts to his heart's content, (being responsible only for the abuse of his liberty in this respect), if his reflections upon the court are not published in the presence of the court or in relation to a case pending.

Not so with the school teacher's authority, under the decision in the principal case. He can reach out and punish as for contempt of school discipline the unfortunate culprit who may send to the county newspaper a poetic effusion which holds up the teacher to public ridicule although no rule of the school has been violated nor breach of discipline committed within the presence of the teacher.

Such a rule as this institutes in effect a revival of the old common law offense of *scandalum magnatum*, in the interest of school teachers and school boards. This is an offense akin to *lese majeste* and at common law consisted in holding up to public scorn and ridicule any public official or high dignitary of state or of the nobility. This offense has never been seriously recognized in this country. Indeed, if it were, many an unfortunate newspaper cartoonist would be languishing in jail for the offense of *scandalum magnatum*, committed by grossly misrepresenting the facial appearance of the president of the United States and attempting to hold him up to public ridicule. It is possible no court would be ready to say that such an offense is wholly antagonistic to the spirit of our republican institutions, and therefore, does not obtain in this country; but it is very apparent that such an offense is hardly in keeping with a constitution which guarantees that the right of free speech shall never be abridged.

It is true that there are a few decisions which indicate a tendency on the part of some courts to revive the offense of *scandalum magnatum*, as ground for contempt when the offense is committed against the dignity of the court and irrespective of whether a case is pending or not. *Burdett v. Commonwealth*, (Va. 1904) 60 Cent. L. J. 10; *In re Chadwick*, 109 Mich. 588; *State v. Shepherd*, (Mo.) 76 S. W. Rep. 79. But we have already showed in an exhaustive annotation entitled "Scandalizing the Court as a Contempt of Court Independent of a Cause Pending" (60 Cent. L. J. 13) that the arguments in the last two cases, cited supra, were merely "obiter," as the facts disclosed that there were cases pending in regard to which the contempt was committed. We also showed, however, that all three of these decisions so far as they attempted to revive the old monarchical offense of *scandalum magnatum* as a ground of contempt had not only met with stern public denunciation but were out of all harmony with the great weight of authority, and with the policy and spirit of American constitutional law and institutions.

Here then in the principal case, innocently looking enough, and evidently not considered by the court, from this aspect, is the revival of this same offense as a basis for the extension of

school authority over the conduct of pupils outside of school hours. We cannot conceive, for the life of us, why the offense of holding up a court or judge to ridicule by a publication which has no relation to any case pending in court and for which the court is powerless to punish the offender as for contempt (*State v. Kaiser*, 20 Oreg. 50) is not quite as serious as the publication by a pupil of a public school of a poem, which holds up a teacher to ridicule, where such publication is committed after school hours and outside the presence of the teacher, and where such publication constitutes no infraction of any specific rule or regulation of the school. This certainly looks like a revival of the offense of *scandalum magnatum*, to uphold the dignity of school discipline where the same is not extended for the purpose of upholding the dignity of the court.

The trouble with our modern decisions is that they do not go deep enough. Judges so often scratch merely the surface of a legal proposition, picking up merely the chaff of what they term "cases in point," while overlooking the rich kernels of fundamental principle, which have universal application, and which always solve a legal difficulty more readily and more accurately than any "case in point" could possibly do.

The only possible ground for such a rule as is enunciated in the principal case is that as to minor children, not *sui juris*, the state in the public school system, assumes, to a certain extent the rights and duties of the parent and the latter's right to that extent is curtailed. There is no doubt but that the state as *parens patriae* may, when the public welfare demands it and to that extent only, dispossess parental authority and assume that relation to the children of the state. Such has been the ground on which the Juvenile Court laws have been sustained. But where a state desires to assert such authority or give any official board or committee such rights, it must by statute, clearly define the extent of the authority which it thus desires to assume. Surely the mere creation of a school committee to control a public school in a certain district does not give such committee control of the conduct of the children of such district outside of school hours where such conduct in no sense constitutes a violation of any specific regulation of the school. This is an assumption of parental authority by a state board without proper statutory authorization.

ALEXANDER H. ROBBINS.

JETSAM AND FLOTSAM.

THE LONGEST LAWSUIT.

Instances of long-drawn-out litigation have frequently been noticed in this column with appropriate and witty remarks anent the law's delay. But all those which have hitherto received honorable mention must now retire to the extreme rear and take seats, for they are the veriest babes in arms in comparison with the hoary-headed Methuselah of a lawsuit which is reported to have reached an amicable settlement in the German courts on February 17 last past. In 1430, more than half a century before Columbus sailed the ocean blue, this contest arose between the local authorities of Friemar, a suburb of Gutha, and certain mill owners of a neighboring village. It was some-

thing about a dam (the German equivalent of which we understand to be *verdamm*) in the river Nesse, the height of which had been raised by the mill owners to the great damage of the said village of Friemar. During the intervening 478 years the great legal battle has raged with unflagging activity, and the mind recoils from a contemplation of the cost and counsel fees that must have been swallowed up. Just what were the terms of the settlement which ended the struggle, we regret to say we are not informed. However, it is safe to assume that the doughty village of Friemar long since adjusted itself to its new high-water mark and that the original mill owners are not now greatly concerned whether or not their dam shall longer impede the seaward progress of the river Nesse.—Law Notes.

NEWS ITEM.

JUDGE EATON ON BAR PRIMARIES.

Judge Amasa M. Eaton, a prominent lawyer of Rhode Island and president of the committee on uniform laws of the National Bar Association, who was in Spokane, Wash., recently on his way home from Seattle, where he attended the sessions of the National association, indorsed the plan of the bar primary of the direct primary election law, which was given its first test in the State of Washington, September 8, 1908. He added that lawyers in New England as well as all over the country are deeply interested in the outcome of the various contests, and added that the people at large should follow as near as possible the lawyers in the selection of jurists. He said:

"I heartily approve of your bar primary, and I should like to see such a system adopted in Rhode Island, and in every state in New England as well as all over the middle west, east and south. We have nothing of that kind now. The plan seems ideally designed to promote the purpose of your direct primary law, and is an evidence of the advanced western spirit we hear so much about in the east. The eastern states are very conservative, however, and such departures from the old customs, no matter how desirable, make slow headway with us.

"Your direct primary gives the people the close control they should have over candidates for office, but the general voters have little opportunity to become acquainted with the fitness or qualifications of candidates for the bench, and any system which will give them the benefit of the opinion of all the lawyers of the community upon the qualifications of judicial candidates will be of great help in securing an able and honest judiciary. The bar primary plan is perfectly adapted to that end, and its candidates certainly ought to be indorsed by the voters at the polls.

"The lawyers may not be better qualified than the people at large to choose the judges, but they certainly are the only large class of men in the community who have any adequate opportunity to form a correct estimate of the character and ability of judicial candidates, and I believe that the intelligent voters of the community will appreciate and follow the judgment of the lawyers in their selection of candidates for the bench.

"The bar primary plan appeals to me as a practical means of removing the bench from politics. The hand-shaking politician would

stand little chance of getting an indorsement from the members of the bar, who must practice before him, and without personally knowing the result of the bar indorsement here I should feel safe in saying that if any of the candidates actively solicited the members of the bar to vote for him, he did not receive an indorsement.

I am informed by prominent members of the bar in the State of Washington that my opinion in that particular is borne out by the facts, and that the most active personal solicitors of votes among the candidates failed to get an indorsement, and I can well believe it. A surprising feature of the contest to me is the fact that some of the candidates who voluntarily submitted their names to the bar and sought an indorsement from the lawyers, but failed to secure it, have now come out and asked the people to elect them.

"It would certainly seem to an unprejudiced outsider that when they failed to secure a vote of confidence from the bar, after having voluntarily sought it, they should abide by the result and withdraw their names."

CORRESPONDENCE.

POWER OF LEGISLATURE TO MAKE CONTRACTOR AGENT OF PROPERTY OWNER FOR THE PURPOSE OF ESTABLISHING A MECHANIC'S LIEN.

Editor Central Law Journal:

In the Central Law Journal for June 5th, page 447, under Building Contracts and Mechanic's Liens, the following appears: "Neither have the people invested the legislature with power to provide that the contractor shall be the agent of the property owner in ordering work or material to be used in the construction of a building in the absence of any agreement to that effect between them."

The foregoing seems to me, to be a misleading and erroneous statement of the law.

In Minnesota, the following statutory provisions have been upheld: Minn. Rev. Laws 1905, Section 3505. "Whoever contributes to the improvement of real estate by performing labor, or furnishing skill, material, or machinery, * * * Whether under contract with the owner of such real estate or at the instance of any agent, trustee, contractor, or sub-contractor of such owner, shall have a lien upon said improvement, and upon the land on which it is situated or to which it may be removed * * *." (Held constitutional, 46 Minn. 285.)

It does not seem that the lien holders are restricted by the contract between the contractor and land owner, to any very great extent, for it has been held that, the lien of a subcontractor may be enforced irrespective of the state of the accounts between the contractor and owner. 32 Minn. 358. Laborers, materialmen and subcontractors are charged with notice of the original contract and to certain extent restricted by it. 46 Minn. 285. But it would seem restricted only to the extent, that work or material must be reasonably adapted to or suitable for the building or improvement contracted for by the owner. 32 Minn. 358, 46 Minn. 285. A lien may be had for material furnished in good faith for a particular building, although they

are not used in such building. 47 Minn. 565, 48 Minn. 225, 61 Minn. 303.

PHIL T. MEGAARDEN.
Minneapolis, Minn.

HUMOR OF THE LAW.

"Now, remember," said a barrister to an Irish witness, "that you have sworn to tell the truth, the whole truth, and nothing but the truth." "Yis, sorr, I'll do the best I can. But I hope th' gintlemin of the jury will be a trifle aisy on me at the start, for I'm little used to that sort of spaking!"—Exchange.

When Grover Cleveland was practicing law in Buffalo, one of his friends was a lazy young lawyer who was forever pestering him with questions about legal points that he could just as well have looked up for himself. Even Cleveland's patience had an end. One day as his friend entered he remarked:

"There are my books. Help yourself to them. You can look up your own case."

The lazy lawyer stared at him in amazement. "See here, Grover Cleveland," he said, indignantly, "I want you to understand that you and your old books can go to thunder. You know very well that I don't read law. I practice entirely by ear."—The Green Bag.

WEEKLY DIGEST.

Weekly Digest of ALL Current Opinions of ALL the State and Territorial Courts of Last Resort, and of all the Federal Courts.

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1. Abatement and Revival—Statutes.—Where a statute creates a new right, and gives a remedy for its enforcement, the remedy is exclusive, and hence the fellow servant act of 1897 (Laws 1897, p. 96, Sec. 1), giving a remedy to an injured fellow servant, cannot be enlarged to confer on his representatives, the remedy in event of his death from the injury.—Strottman

v. St. Louis, I. M. & S. Ry. Co., Mo., 109 S. W. Rep. 769.

2. **Accident Insurance**—Rule of Construction.—The natural meaning of a contract of insurance must be preferred to any curious hidden sense evolved by the ingenuity of an acute intellect and the exigencies of a hard case.—Standard Life & Accident Ins. Co. v. McNulty, U. S. C. C. of App., Eighth Circuit, 157 Fed. Rep. 224.

3. **Adverse Possession**—Color of Title.—A pre-emption, location, and patents for land which was not vacant and unappropriated public domain held insufficient to support a title under the three-year statute of limitations.—Gilbert v. Harris, Tex., 109 S. W. Rep. 392.

4.—Color of Title.—A patent regularly issued by the officer intrusted with the duty of issuing patents held to furnish to the patentee title or color of title.—Hulett v. Platt, Tex., 109 S. W. Rep. 207.

5. **Alteration of Instruments**—Alteration by Strangers.—While an alteration of a chattel mortgage by the mortgagee or his authorized agents, pending a suit for the possession of the mortgaged chattel, renders the mortgage void, yet, if the alteration is made by a stranger, the mortgage is not affected.—Gurley Bros. v. Bunch, Mo., 108 S. W. Rep. 1109.

6. **Animals**—Fences.—A landowner who had neglected to keep a partition fence in repair under an agreement made, under Shannon's Code, Secs. 2998, 3005, held not entitled to recover damages for injury caused by hogs entering through the defective fence.—Brown v. Sams, Tenn., 109 S. W. Rep. 513.

7. **Appeal and Error**—Assignment of Error.—An assignment of error presenting objections to part of counsel's argument cannot be considered on appeal where not preserved by bill of exceptions approved by the court; affidavits presented in the motion for a new trial not being a sufficient substitute.—Colorado Canal Co. v. McFarland & Southwell, Tex., 109 S. W. Rep. 435.

8.—Bill of Exceptions.—Though a bill of exceptions be not properly before the appellate court, and motions for a new trial and in arrest of judgment are not filed, the court may decide whether the petition states a cause of action.—State v. Duncan, Mo., 109 S. W. Rep. 73.

9. **Appearance**—Jurisdiction Acquired.—A general appearance is a waiver of process, and confers upon the court where the case is pending jurisdiction over the person appearing.—Mueller v. Heldemeyer, Tex., 109 S. W. Rep. 447.

10. **Arrest**—Necessity of Warrant.—The offense of trespassing in a railroad yard, and entering a car therein for the purpose of stealing a ride, is neither a breach of the peace nor a felony, and an officer cannot arrest the offender without a warrant.—Texas & N. O. R. Co. v. Parsons, Tex., 109 S. W. Rep. 240.

11. **Assignments**—Non-negotiable Choses in Action.—The assignee of a non-negotiable chose in action occupies the same position respecting it as his assignor, and a contract void in the hands of the assignor is void in the hands of the assignee.—United Shoe Machinery Co. v. Ramlose, Mo., 109 S. W. Rep. 567.

12. **Attorney and Client**—Costs in Investigating Misconduct of Attorney.—Part of the costs of investigating the professional conduct of attorneys held properly awarded against one who

prejudiced his client against an associate attorney to procure the latter's discharge.—Finley v. Acme Kitchen Furniture Co., Tenn., 109 S. W. Rep. 504.

13.—Settlement by Client.—A client may settle the case at any time without the consent of his attorney, regardless of a contract between them that the attorney is to receive a certain part of the judgment as his compensation.—McRea v. Warehime, Wash., 94 Pac. Rep. 924.

14. **Bills and Notes**—Action on Draft.—One who holds a draft payable to himself may maintain an action thereon in his own name against the acceptor, even if he has no beneficial interest in the proceeds.—Eagle Min. & Imp. Co. v. Levy, N. M., 94 Pac. Rep. 949.

15. **Bankruptcy**—Acts of Bankruptcy.—Under B. & C. Comp. St. Or. Sec. 5070, as amended by Sess. Laws 1903, p. 41, Sec. 3, the directors of a corporation, unless the power is conferred by the stockholders, cannot commit on behalf of the corporation the act of bankruptcy specified in Bankr. Act, c. 541, sec. 3a (5), by admitting the inability of the corporation to pay its debts, and its willingness to be adjudged a bankrupt.—In re Quartz Gold Min. Co., U. S. D. C., D. Oregon, 157 Fed. Rep. 243.

16.—Manufacturing Defined.—An allegation in a petition in bankruptcy against a corporation, that it "is engaged in the business, and was incorporated for the purpose, of building houses," as against a demurrer, is sufficient to bring the corporation within the scope of Bankr. Act, c. 541, Sec. 46, as one engaged in "manufacturing."—In re Rutland Realty Co., U. S. D. C., S. D. N. Y., 157 Fed. Rep. 296.

17.—Partnership.—Where the widow and executrix of a deceased partner had actual knowledge of the institution of bankruptcy proceedings against the partnership after the testator's death, she is not entitled to have the adjudication set aside after a composition has been confirmed merely because her testator was not named as a partner.—In re Coe, U. S. D. C., S. D. N. Y., 157 Fed. Rep. 308.

18.—Provable Claims.—A note given by a bankrupt to a bank, in consideration of a like note to him by the president of such bank, held to have been for the accommodation of the president individually, and not of the bank, which was therefore entitled to prove its note against the bankrupt estate.—Merchants' & Manufacturers' Nat. Bank of Columbus, Ohio v. Galbraith, U. S. C. C. of App., Sixth Circuit, 157 Fed. Rep. 208.

19.—Reclamation of Property by Seller.—Showcase fixtures made for the store of a bankrupt held not to have been delivered, so as to pass title prior to the bankruptcy, and the seller is entitled to reclaim the same.—In re Kingston Realty Co., U. S. D. C., E. D. N. Y., 157 Fed. Rep. 303.

20.—Time for Taking Appeal.—The 10 days allowed by Bankr. Act, c. 541, Sec. 25e, for taking an appeal from a judgment allowing or rejecting a claim, cannot be extended by the filing of a petition for rehearing after such time has expired, nor will an appeal lie from the ruling on such a petition which is addressed to the discretion of the court.—Morgan v. Benedict, U. S. C. C. of App., Fourth Circuit, 157 Fed. Rep. 232.

21.—Vacation of Receivership.—A court of

bankruptcy has discretion to discharge a receiver appointed pending hearing on an involuntary petition against a corporation, where it appears probable that by so doing the corporation may be enabled to obtain money and avoid insolvency.—*In re Church Const. Co.*, U. S. D. C., S. D. N. Y., 157 Fed. Rep. 298.

22. **Boundaries—Conflicting Calls.**—In determining boundaries where there are conflicting calls, calls for course and distance must yield, first, to natural objects; and, second, to artificial objects.—*Weston v. Meeker*, Tex., 109 S. W. Rep. 461.

23. **Brokers—Sale of Land.**—Unless a principal has waived his right to sell land placed in the hands of a broker, he may sell without liability for commissions, unless the broker's efforts were the procuring cause of the sale.—*Burch v. Hester & Lawhorn*, Tex., 109 S. W. Rep. 399.

24. **Carriers—Freight Rates.**—Neither railroad nor shipper can make a valid contract for a less rate than the published schedule filed with the Interstate Commerce Commission.—*Pecos Valley & N. E. Ry. Co. v. Harris*, N. M., 94 Pac. Rep. 951.

25. **Questions of Fact.**—It is a question of fact in an action against a carrier for personal injuries whether plaintiff contracted neurasthenia as a result of defendant's negligence.—*El Paso Electric Ry. Co. v. Bolgiano*, Tex., 109 S. W. Rep. 388.

26. **Soliciting Hotel Patronage at Station.**—An ordinance making it unlawful for any person to drum business for a hotel on the trains or depots of railroads held to include and prohibit the drumming of trade, not only in the depot building, but on the platform and grounds connected therewith.—*Moore v. Campbell*, Ark., 109 S. W. Rep. 544.

27. **Through Rates.**—A carrier which accepts and carries an interstate shipment on a through bill of lading, openly charging the sum of the published local rates between the points named therein, thereby creates a through route and accepts the published aggregate as the lawful through charge, and any rebate given therefrom is a violation of Elkins Act.—*United States v. Great Northern R. Co.*, U. S. C. C., S. D. N. Y., 157 Fed. Rep. 288.

28. **Conspiracy—Averment of Overt Act.**—Whether an act charged in an indictment for conspiracy as an overt act to effect the object of such conspiracy was such overt act may be determined by the court, where it is clear from the face of the indictment that it could not by any possibility, have tended to effect the object of the conspiracy.—*United States v. Biggs*, U. S. D. C., D. Colo., 157 Fed. Rep. 264.

29. **Constitutional Law—Elkins Act.**—Elkins Act. is not unconstitutional as depriving shippers or carriers of property rights without due process of law.—*United States v. Great Northern R. Co.*, U. S. C. C., S. D. N. Y., 157 Fed. Rep. 288.

30. **Ex Post Facto Laws.**—Laws providing for the commitment, detention, and discharge of the insane are not penal in any sense of the word, and the term "ex post facto laws" has no application to laws which merely affect or change modes of procedure.—*State v. Snell*, Wash., 94 Pac. Rep. 926.

31. **Police Power.**—Act April 30, 1907, p. 553, making it unlawful for any person to drum

or solicit business for any hotel on the train or depot of any railroad, etc., is constitutional, and an order adopted thereunder by the city of Hot Springs, imposing a penalty for such acts was valid.—*Moore v. Campbell*, Ark., 109 S. W. Rep. 544.

32. **Contracts—Duress.**—If the threats of arrest and prosecution of a son deprived his father of his free will power, and constrained the execution of a mortgage, the actual guilt of the son was not a material question in determining whether there was duress.—*Williamson-Hallsell Frazier Co. v. Ackerman*, Kan., 94 Pac. Rep. 807.

33. **Reasonable Time.**—Where a written contract provided that the work was to commence at a given time, and be completed "faithfully and continuously," the question of reasonable time was for the jury.—*Hagerman v. Cowles*, N. M., 94 Pac. Rep. 946.

34. **Time as the Essence.**—Notice that a party to a contract will consider the contract breached if the other party does not perform his part of the contract on the date specified is not necessary, where time is of the essence of the contract.—*Weatherford Machine & Foundry Co. v. Tate*, Tex., 109 S. W. Rep. 406.

35. **Waiver of Breach.**—Under a contract for deliveries of bran throughout a month, the seller was not bound to deliver after the expiration of the month and after the price had advanced, where the buyer prevented delivery during the early part of the month at the contract price.—*Townes v. Oklahoma Mill Co.*, Ark., 109 S. W. Rep. 548.

36. **Copyrights—Double Copyrighting.**—An artist by depositing the name and description of a painting in the prescribed office did not obtain a valid copyright thereon, where he had previously deposited a photograph of the painting for the same purpose under a different name and description, unless it is shown that such prior deposit was inoperative.—*Caliga v. Inter Ocean Newspaper Co.*, U. S. C. C. of App., Seventh Circuit, 157 Fed. Rep. 186.

37. **Corporations—Liability of Stockholders.**—Where stock subscriptions were paid in and partly exhausted in business begun before filing the charter, the stockholders should be credited on their subscriptions with assets on hand at the time of filing the charter.—*Bank of De Soto v. Reed*, Tex., 109 S. W. Rep. 256.

38. **Restrictions on Powers.**—A corporation having the right of eminent domain is subject to the limitations and restrictions imposed upon such corporations whether it has exercised the right or not.—*Colorado Canal Co. v. McFarland & Southwell*, Tex., 109 S. W. Rep. 435.

39. **Unauthorized Acts of Officers.**—A corporation held not entitled in equity to repudiate payments made on its behalf by its officers for property purchased by its promoters before its incorporation, although such payments were irregularly made.—*Hawkeye Gold Dredging Co. v. State Bank of Iowa Falls*, U. S. C. C., N. D. Iowa, 157 Fed. Rep. 253.

40. **Criminal Evidence—Harmless Error.**—The error in permitting the prosecution to prove a fact by accused, testifying in his own behalf, is not ground for reversal, where the same fact is proved without objection by other witnesses.—*Wagner v. State*, Tex., 109 S. W. Rep. 169.

41. **Criminal Trial—Jurisdiction.**—In a prosecution for the theft of a mule in the district

court of the county to which the mule was taken and sold, the bare arrest and examination of defendant in another county from which he took the mule held not to defeat the trial court's jurisdiction.—Greathouse v. State, Tex., 109 S. W. Rep. 163.

42.—**Right to Appeal.**—Where an accused escaped conviction and was recaptured, the act of trial court in allowing him to execute an appeal bond held a judicial determination that he was in such custody as to entitle him to appeal. Bush v. State, Tex., 109 S. W. Rep. 184.

43.—**Testimony of Accomplice.**—To sustain a conviction upon the testimony of an accomplice, there must be other proof tending to connect accused with the commission of the offense; the strength of the corroborating testimony required depending largely upon the facts of each case.—Criner v. State, Tex., 109 S. W. Rep. 128.

44. **Damages—Duty to Minimize.**—One threatened with damage by reason of the negligence of another must use ordinary care to render the injury as light as possible, provided it can be done at a reasonable expense.—Western Union Telegraph Co. v. Johnsey, Tex., 109 S. W. Rep. 251.

45.—**Future Pain and Suffering.**—A person injured by another's negligence is entitled to recover for such future pain and suffering as are reasonably certain to result from the injury but not for such as "may" result or are merely probable or likely.—Onargo v. Twohy, Wash., 94 Pac. Rep. 916.

46. **Dead Bodies—Negligent Handling of Corpse.**—A mother may recover from a carrier for its negligent handling of the corpse of her child resulting in injury to the corpse.—Missouri, K. & T. Ry. of Texas v. Hawkins, Tex., 109 S. W. Rep. 221.

47. **Dedication—Streets and Alleys.**—The laying out of a town or an addition and the platting thereof into blocks and lots and the sale of lots by reference to the plat held an irrevocable dedication of the streets and alleys to public use.—City of Stuttgart v. John, Ark., 109 S. W. Rep. 41.

48. **Disorderly House—Evidence.**—The character of a house as a disorderly house may be established by common repute, but the proof must directly implicate the person charged with keeping it, in order to convict.—Machem v. State, Tex., 109 S. W. Rep. 126.

49. **Elections—Attempt or Offer to Vote.**—One who had not procured a ballot and had none in his possession held not liable for "offering and attempting" to cast a ballot illegally.—State v. Fielder, Mo., 109 S. W. Rep. 580.

50. **Eminent Domain—Condemnation Proceedings.**—Compensation for land taken in condemnation proceedings does not include damages for an injury to the residue of the tract which are recoverable only as incidental damages.—Vaulx v. Tennessee Cent. R. Co., Tenn., 108 S. W. Rep. 1142.

51.—**Rights of Remaindermen.**—Where a railroad company occupied a right of way under a deed from the life tenant, held, that the remaindermen could have but one recovery for value of the land taken and damages to the remainder of the tract.—Turner v. Missouri Pac. Ry. Co., Mo., 109 S. W. Rep. 101.

52. **Equity—Accounting.**—Where there can be no relief on the main ground, a bill will not

be retained for the mere purpose of having an accounting which is only incidental to the main relief.—Bell v. Bank of California, Cal., 94 Pac. Rep. 889.

53.—**Objection to Jurisdiction.**—Where the subject-matter of a suit is of equitable cognizance, a court of equity will not dismiss the suit on the ground that there may also be a remedy at law, unless the objection is made by defendant before entering on its defense.—Hawkeye Gold Dredging Co. v. State Bank of Iowa Falls, U. S. C. C., N. D. Ia., 157 Fed. Rep. 253.

54. **Estoppel—Change of Theory.**—A party who by his pleadings has taken a certain position cannot, after verdict, "mend his hold" by taking a new and inconsistent position, on motion for new trial.—Home Sav. Bank of Des Moines, Iowa v. Woodruff, N. M., 94 Pac. Rep. 957.

55.—**Tenants in Common.**—Where a tenant in common is estopped from doing a particular act on the premises as against the owner of adjacent premises, the tenant, neither alone nor in conjunction with the co-tenant, will be permitted to act contrary thereto.—Woods v. Lowrance, Tex., 109 S. W. Rep. 418.

56. **Evidence—Bloody Clothing.**—In an action for damages for an assault, a shirt spotted with blood, which was worn by the assaulted person, is admissible in the discretion of the court, as corroborative evidence of the violence of the assault.—Keen v. St. Louis, I. M. & S. R. Co., Mo., 108 S. W. Rep. 1125.

57.—**Market Value.**—A witness who has gained his knowledge of the state of the market by market reports and by telegrams and accounts of sale, may testify as to the market value of an article.—Galveston H. & S. A. Ry. Co. v. Karrer, Tex., 109 S. W. Rep. 440.

58. **Exceptions, Bill of—Time for Filing.**—Neither a judge in vacation nor the court has power to extend the time for filing a bill of exceptions after the time theretofore extended has expired.—State v. Duncan, Mo., 109 S. W. Rep. 73.

59. **Executors and Administrators—Sale of Property.**—The fact that there are conflicting claims to the land sold by an administrator under order of court at the time of sale does not affect the right of the administrator to sell.—Evans v. Ashe, Tex., 108 S. W. Rep. 1190.

60. **Federal Courts—Rules of Decision as Between Different Circuits.**—In the Circuit Court of Appeals for the First circuit it is the practice to follow the decisions of other Circuit Court of Appeals whenever they can form a precedent, as in case of the construction of a federal statute.—Gill v. Austin, U. S. C. C. of App., First Circuit, 157 Fed. Rep. 234.

61. **Fraud—Action for Deceit.**—An action for fraud and deceit must be predicated on existing facts and not of matters possible to arise, and the plaintiffs pleading must allege that the representations were false, and that plaintiff was misled thereby to his injury.—Kimber v. Young, U. S. C. C. of App., Eighth Circuit, 157 Fed. Rep. 199.

62.—**Laches.**—Where, by ordinary diligence, complainant could have discovered the fraud in time to have brought his suit within the time fixed by limitations, he was guilty of laches.—Redd v. Brun, U. S. C. C. of App., Eighth Circuit, 157 Fed. Rep. 190.

63. **Frauds, Statute of—Assignment.**—Where an assignment of a permit to drill a well is not in writing, and hence within the statute of frauds, it is a question of fact for the jury whether the party to be charged has waived his right to rely on the statute.—*Shannon v. Mastin, Mo.*, 108 S. W. Rep. 1116.

64. **Fraudulent Conveyances.**—Creation of Debt.—A pre-existing creditor's right to attack a fraudulent conveyance held not affected by the fact that the note evidencing the debt was renewed subsequent to the conveyance.—*Crooke v. Hume's Ex'x., Ky.*, 109 S. W. Rep. 364.

65. **Homestead — Chattel Mortgages.**—A mortgage of fixtures attached to a homestead, void under the Constitution, prohibiting liens on homesteads, was not vitalized by the subsequent cancellation of the title on which the homestead right was predicated.—*Doak v. Moore, Tex.*, 109 S. W. Rep. 405.

66. **Homicide—Duty to Retreat.**—It is not necessary for one forced into a difficulty by another to retreat, but the one provoking the difficulty must retreat, before he can exercise the right of self-defense.—*Voight v. State, Tex.*, 109 S. W. Rep. 205.

67. **Express Malice.**—Express malice, in the sense of hatred or malevolence toward the deceased, need not be shown in order to support a verdict of murder in the first degree.—*Turner v. State, Tenn.*, 108 S. W. Rep. 1139.

68. **Malice.**—Where one with express malice shoots at another with a deliberate intent to kill him, and kills a third person accidentally he is guilty of murder in the second degree.—*Thomas v. State, Tex.*, 109 S. W. Rep. 155.

69. **Manslaughter.**—Homicide committed under passion rendering the mind incapable of cool reflection held manslaughter.—*Gillespie v. State, Tex.*, 109 S. W. Rep. 158.

70. **Infants — Rights of Disaffirmance.**—Where a conveyance by certain minors was set aside on their becoming of age, the grantee was entitled to set off taxes, repairs, and improvements against the minors' claim for rents accruing within three years.—*Tobin v. Spann, Ark.*, 109 S. W. Rep. 534.

71. **Injunction—Use of Land.**—A covenant in a deed limiting the use of the land conveyed will be enforced in equity by injunction, though the covenant is not of the class technically running with the land.—*Woods v. Lowrance, Tex.*, 109 S. W. Rep. 418.

72. **Insane Persons — Undue Influence.**—Where, in an action for partition, a deed to plaintiff from one of defendants alleged to be of unsound mind was sought to be set aside, it was discretionary with the trial court to inquire into the mental condition of defendant in limine, or to submit the question to the jury with the other issues.—*Lindly v. Lindly, Tex.*, 109 S. W. Rep. 467.

73. **Internal Revenue—Distiller's Bond.**—The surety on a distiller's bond, charged with liability for taxes assessed on spirits illegally made, held entitled to credit for the amount of the tax on a part of such spirits, which were seized and sold, and the tax on which was paid from the proceeds.—*United States v. National Surety Co., U. S. C. C. of App., Fifth Circuit*, 157 Fed. Rep. 174.

74. **Judgment—Res Judicata.**—A judgment in an action against a telephone company for

injury to a street railway conductor for the telephone company held conclusive of a subsequent joint action against it and the street railway company.—*Moore v. Chattanooga Electric Ry. Co., Tenn.*, 109 S. W. Rep. 197.

75. **State and Federal Courts.**—It is the rule of the federal courts to give a prior decision of a state court, where the parties and the cause of action were the same as in a cause before it, the same force and effect as a prior adjudication, as would be given it by the courts of the state.—*Gunning System v. City of Buffalo, U. S. C. C., N. D. N. Y.*, 157 Fed. Rep. 249.

76. **Justices of the Peace—Appeal.**—Where an appeal is taken from a justice's court to the county court, none but the parties to the case tried in the justice's court are parties in the county court.—*St. Louis & S. F. Ry. Co. v. English, Tex.*, 109 S. W. Rep. 424.

77. **Landlord and Tenant—Leases.**—A lease to commence in future is grantable, and the fact that a lease fixes a date in the future for the commencement of the term does not make it an executory, rather than an executed, contract.—*Johnston v. Corson Gold Min. Co., U. S. C. C. of App., Ninth Circuit*, 157 Fed. Rep. 145.

78. **Repairs.**—The lessor of a building held liable for damages to the lessee's goods caused by rain during the repairing of the roof by an independent contractor.—*Eberson v. Continental Inv. Co., Mo.*, 109 S. W. Rep. 62.

79. **Tenancy at Will.**—When a person enters into possession of and by express permission of the owner at will, such possession creates the relation of landlord and tenant; the tenant during said tenancy holding the land in subordination to the title of the owner.—*Buford v. Wasson, Tex.*, 109 S. W. Rep. 275.

80. **Larceny—Wife's Separate Property.**—Notwithstanding Rev. St. 1895, arts. 2967, 2968, giving the husband management of the wife's separate property, in a prosecution for the theft of a ring, the separate property of the wife, by Code Cr. Proc. 1895, art. 445, the ownership of the ring was properly alleged in the wife.—*Kauffman v. State, Tex.*, 109 S. W. Rep. 172.

81. **Libel and Slander—Sufficiency of Complaint.**—An article published in a newspaper which to the common understanding charged that a woman referred to was the mistress of plaintiff is libelous per se, and special damages need not be alleged in a complaint for the libel.—*Dempster v. Mann, U. S. C. C., S. D. N. Y.*, 157 Fed. Rep. 319.

82. **Limitation of Actions—Absence from State.**—In an action on a note more than four years after it became due, defendant having left the state before the debt was barred, plaintiff did not have the burden of stating the precise periods during which defendant visited the state.—*Dignowity v. Sullivan, Tex.*, 109 S. W. Rep. 428.

83. **Applicability of Statute.**—The nature of the right sued on, and not the form of the action, nor the relief demanded, determines the applicability of the statute of limitations under the Code; it being immaterial whether legal or equitable relief is sought.—*Bell v. Bank of California, Cal.*, 94 Pac. Rep. 889.

84. **Literary Property—Common Law and Statutory Copyrights.**—The common law gives the author of a painting the exclusive right to reproduce the same so long as he does not make

publication, but on publication such right is lost, and he can only acquire the right to further protection by a statutory copyright.—*Calliga v. Inter Ocean Newspaper Co.*, U. S. C. C. of App., Seventh Circuit, 157 Fed. Rep. 186.

85. **Lost Instruments**—Evidence to Establish Contents.—Parol evidence to establish the contents of a lost deed should be clear and certain and should show that the deed was properly executed with the legal formalities, and should show substantially, but not literally, the contents of the deed.—*Nemo v. Farrington*, Cal., 94 Pac. Rep. 874.

86. **Master and Servant**—Burden of Proving Negligence.—In an action for the death of a servant, it is not necessary to a recovery to show that decedent neither knew, nor might by the exercise of ordinary care have discovered, the dangerous or defective condition of the premises which resulted in his death.—*Moseley's Adm'r. v. Black Diamond Coal & Mining Co.*, Ky., 109 S. W. Rep. 306.

87.—**Defective Appliances**.—A master must exercise proper diligence to keep appliances safe, and cannot fail to inspect because the appliances have hitherto always performed their functions properly.—*Converse Bridge Co. v. Grizzle*, Tenn., 109 S. W. Rep. 290.

88.—**Negligence of Servants**.—Operatives of a switch engine held negligent in continuing to back certain cars for the purpose of coupling them into a train without further orders or signal from plaintiff, and contrary to the custom in the yard, by which negligence plaintiff was injured.—*Cunningham v. Neal*, Tex., 109 S. W. Rep. 455.

89.—**Safe Place to Work**.—A street railway company held not liable to a conductor who was injured by his head coming in contact with a telephone pole not on the railway company's right of way.—*Moore v. Chattanooga Electric Ry. Co.*, Tenn., 109 S. W. Rep. 497.

90. **Municipal Corporations**—Bond Issues.—That, after a municipal census, a city acted on the theory that it had 2,000 inhabitants in issuing dramshop licenses, held not to prevent a court from holding the census insufficient to sustain a bond issue under a constitutional provision limiting authority to issue bonds.—*State v. Wilder*, Mo., 109 S. W. Rep. 574.

91.—**Bridge Ordinances**.—A corporation agreeing to pay into the treasury of a city a specified sum on the city adopting an ordinance for the construction of a bridge held required to make the payment on the city adopting the ordinance for the construction of the bridge.—*City of St. Louis v. Terminal R. Assn.*, Mo., 109 S. W. Rep. 641.

92. **Negligence**—Proof.—In ascertaining the existence or nonexistence of negligence, the issue must be considered relative to all the circumstances of time, place, and person.—*Gregg v. Northern Pac. Ry. Co.*, Wash., 94 Pac. Rep. 911.

93. **New Trial**—Surprise.—The doctrine of surprise as ground for a new trial does not apply to the testimony of witnesses of the opposite party, nor to evidence introduced by such party, where the same tends to support the issues joined, and is such as might reasonably have been anticipated.—*Plumlee v. St. Louis Southwestern R. Co.*, Ark., 109 S. W. Rep. 515.

94. **Nuisance**—Livery Stable.—Where defend-

ants constructed a livery stable on a lot adjoining plaintiff's residence, defendants were not entitled to leave window openings in the wall next to plaintiff's residence within a few feet from the windows of plaintiff's bedrooms.—*Durfee v. Thalheimer*, Ark., 109 S. W. Rep. 519.

95. **Partnership**—Liability of Dormant Partner.—Dormant partner held liable to third persons dealing with the ostensible partners for acts of partnership, though done without authority.—*Knelsley Lumber Co. v. Edward B. Stoddard Co.*, Mo., 109 S. W. Rep. 840.

96. **Pleading**—Motion to Make More Definite.—In an action for damages to a cable loaned, a motion to require plaintiff to state definitely the purpose of the loan was properly denied as the matters were within the knowledge of the defendant.—*Sherman v. Hicks*, N. M., 94 Pac. Rep. 959.

97.—**Residence of Parties**.—In an action against a railroad company and an individual for a joint trespass to the person, the plea of privilege of the individual to be sued in the county of his residence must allege that the county in which the suit was instituted was not the domicile of the company.—*Texas & N. O. R. Co. v. Parsons*, Tex., 109 S. W. Rep. 240.

98. **Pledges**—Remedies.—A pledgor held not entitled, under a complaint treating an unauthorized transfer of pledged property by the pledgee as invalid and repudiating it, to have the proceeds of the transfer applied to the debt so far as necessary, and to judgment for the excess remaining.—*Bell v. Bank of California*, Cal., 94 Pac. Rep. 889.

99. **Prohibition**—Nature of Writ.—The writ of prohibition in the judicial discretion of the court may go to confine a court within the limits of its jurisdiction, whether it has no jurisdiction at all or is exercising powers in excess of its rightful jurisdiction.—*State v. Fort*, Mo., 109 S. W. Rep. 737.

100. **Public Lands**—Fraud.—The fraud which will vitiate a patent issued by the proper authority of the state must be fraud practiced on the state or its duly constituted agents, and not on a claimant of the land.—*Hulett v. Platt*, Tex., 109 S. W. Rep. 207.

101.—**Tide Lands**.—Where the state leases tide lands to an individual, the individual is invested with the right to exercise ownership over what is on the land, including clams.—*Sequim Bay Canning Co. v. Bugge*, Wash., 94 Pac. Rep. 922.

102. **Railroads**—Care of Passengers.—A passenger train conductor in the performance of those duties the railroad owes passengers or those rightfully aboard the train held the representative of the company, and bound to refrain from conduct exposing such persons to peril.—*Missouri, K. & T. Ry. Co. of Texas v. Hibbitts*, Tex., 109 S. W. Rep. 228.

103. **Sales**—Action for Price.—A bank held not entitled to recover from its debtor's mother the price of lumber sold by the debtors to her and credited on their debt to her.—*Globe Bank & Trust Co. v. Rigglesberger*, Ky., 109 S. W. Rep. 333.

104. **Sunday**—Compensation for Work Done on Sunday.—Where a servant of his own volition did work on Sundays which was not required by the master nor included in his contract of employment, he cannot recover for it

In an action for wrongful discharge, especially where it was not a work of necessity and constituted misdemeanor under Rev. St. 1899, Sec. 2240, (Ann. St. 1906, p. 1420), prohibiting labor on the Sabbath other than work of necessity.—*Barney v. Spangler, Mo.*, 109 S. W. Rep. 855.

105. **Trial—Instructions.**—Where plaintiff's right to recover was restricted by the general charge to defendant's negligence in the operation of an engine, the court did not err in refusing to charge that plaintiff could not recover because of the dangerous proximity of a post to the track.—*Cunningham v. Neal, Tex.*, 109 S. W. Rep. 455.

106.—**Mentioning Amount Sued for in Charge.**—Mentioning the amount sued for in a charge is not error, except when done in conjunction with a charge as to the amount of the verdict, and, even then, it is not ground for reversal, unless it reasonably appears that such reference influenced the jury in the amount returned.—*El Paso Electric Ry. Co. v. Kelly, Tex.*, 109 S. W. Rep. 415.

107.—**State Statutes as Evidence.**—The refusal of a request that a federal court present and explain the provisions of state statutes to the jury, where they were material as bearing on an issue of fact in dispute, held error.—*Burgess Sulphite Fibre Co. v. Drew, U. S. C. C. of App.*, 157 Fed. Rep. 212.

108. **Trover and Conversion—Defenses.**—In an action for the wrongful conversion by defendant of plaintiff's horses while in custody of a common carrier for transportation, defendant's lack of knowledge as to the particular destination of the animals held not available in mitigation of damages.—*Wallingford v. Kaiser, N. Y.*, 84 N. E. Rep. 295.

109. **Vendor and Purchaser—Fraudulent Representations.**—A vendor guilty of fraudulent misrepresentations held not entitled to say that the grantee will lose nothing if he will avail himself of the lands sold for a different purpose, designated by the grantor.—*Steen v. Weisten, Or.*, 94 Pac. Rep. 834.

110. **Waters and Water Courses—Manufacturing Purposes.**—In an action by a brewery to recover an excess paid for water from the required rate for water furnished for purely manufacturing purposes, held unnecessary to constitute a use for manufacturing purposes that all of it went into the composition of beer, and a finding based on such assumption held reversible error.—*American Brewing Co. v. City of St. Louis, Mo.*, 108 S. W. Rep. 1.

111.—**Water Rent.**—In an action by a water company for rent from land supplied with water, held proper for the court to submit defendant's right to counterclaim for damages to his crop caused by plaintiff's lack of care in furnishing water.—*Colorado Canal Co. v. McFarland & Southwell, Tex.*, 109 S. W. Rep. 435.

112. **Wills—Construction.**—Where a certain sum was to be divided under a will in 10 years between four persons named, and at the expiration of 10 years one of such persons had died, leaving a widow, the widow was neither a donee under the will nor an heir of the legatee.—*Herrick v. Low, Me.*, 69 Atl. Rep. 314.

113.—**Contest.**—A statutory will contest is in the nature of an appeal from the order establishing the will, and leads to a judgment establishing it in solemn form or invalidating it.—*Teckenbrock v. McLaughlin, Mo.*, 108 S. W. Rep. 46.

114.—**Declaration of Testatrix.**—Testatrix will not be presumed ignorant of the contents of a will, because she could not read, where there is a total lack of proof of fraud, undue influence, or want of testamentary capacity.—*Lipphard v. Humphrey, U. S. S. C.*, 28 Sup. Ct. Rep. 561.

115.—**Estate in Remainder.**—A testator held at liberty to so dispose of his estate that an intestacy as to the estate in remainder would follow a trust estate created for the benefit of his widow for her life.—*Home of the Aged of the Methodist Episcopal Church of Baltimore City v. Bantz, Md.*, 69 Atl. Rep. 376.

116.—**Express Declaration.**—Where a will makes no express declaration that a provision for the wife is in lieu of dower, the question of intent must be determined from the provisions of the will read in the light of surrounding circumstances.—*Ottis v. Ottis, S. C.*, 61 S. E. Rep. 109.

117.—**Nature of Estate Created.**—An estate given in fee will not be defeated by a subsequent provision limiting it to a smaller estate, unless the language or intention of the testator requires it.—*McCauley's Guardian v. Dale, Ky.*, 108 S. W. Rep. 268.

118.—**Undue Influence.**—Daughters, who were preferred by their mother's will held not required to explain the will to prevent a presumption of their undue influence.—*Teckenbrock v. McLaughlin, Mo.*, 108 S. W. Rep. 46.

119. **Witnesses—Competency.**—Testimony of plaintiff's brother that defendants' intestate agreed to pay plaintiff a certain sum as a farm hand was properly received where there was no evidence that he was plaintiff's agent in hiring him to deceased.—*Cobb v. Holloway, Mo.*, 108 S. W. Rep. 109.

120.—**Cross Examination.**—In a suit for infringement of a patent, where complainant confined its direct testimony to the making of a prima facie case, the defendant is not entitled to go into matters of defense on cross-examination.—*Aeolian Co. v. Simpson-Crawford Co., U. S. C. C.*, 84 N. Y., 157 Fed. Rep. 320.

121.—**Defective Sidewalks.**—In an action by a married woman for injuries on a city sidewalk, she could not be impeached by evidence that a child was born to her three months after her marriage.—*City of San Antonio v. Wildenstein, Tex.*, 109 S. W. Rep. 231.

122.—**Examinations.**—Where plaintiff was compelled to call defendants to testify in his behalf, he should have been allowed much latitude in examining them.—*Miller v. Denman, Wash.*, 95 Pac. Rep. 67.

123.—**Impeachment.**—The defense should be permitted to recall a state's witness to lay the foundation for impeachment.—*Johnson v. State Fla.*, 46 So. Rep. 154.

124.—**Market Value.**—In an action for damage to cattle by defendant's delay in transporting them, the scope given defendant's counsel in the cross-examination of a witness as to the source of his knowledge as to what the cattle brought held sufficient.—*St. Louis I. M. & S. Ry. Co. v. Rogers, Tex.*, 108 S. W. Rep. 1027.

125. **Work and Labor—Value of Services Rendered.**—A broker might recover in assumption for the reasonable value of his services, though there was a contract to pay for such services; his recovery being limited to the contract price.—*Sackman v. Freeman, Mo.*, 109 S. W. Rep. 818.

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LIABILITY OF "FOURTH PARTIES" FOR INTERFERENCE WITH CONTRACTUAL RELATIONS.

We have had occasion recently to refer to the gradual extension of the rule at common law making it actionable to entice one's servant away into a general doctrine whereby any unlawful and injurious interference with contractual relations, whether malicious or not, is actionable.

Lawyers are just beginning to appreciate the wonderful possibilities of this new rule. In 67 Cent. L. J. 201, we called attention to the recent case of Knickerbocker Ice Co. v. Gardiner Dairy Co., which held it to be actionable for A. to interfere with C.'s contract with B., by refusing to sell to B. if B. continued to sell to C. In our note to that case we cited several authorities and called attention to the almost illimitable application of this new doctrine which it would profit attorneys to carefully study.

We here desire to refer to another recent case which serves to illustrate the wide application of this principle to all contracts, and to every character of unlawful, injurious interference therewith. We refer to the case of Motley, Green & Co. v. Detroit Steel and Spring Co., 161 Fed. 389. In this case, the plaintiffs charged that they had a beneficial contract with the Detroit Steel & Spring Co., whereby they had the exclusive right under contract to sell defendant's springs in a certain territory at certain prices which permitted them to earn a large profit. Later, the plaintiffs charge, the defendant organized The Railway Steel Spring Co., also a defendant in this case, and procured from the latter an offer to purchase all the stock and patents of the Detroit Company, by which transaction when it was consummated, the Detroit

Company was compelled to break its contract with the plaintiffs.

The plaintiffs sued both companies in tort for procuring a breach of their contract with the Detroit Company and asked for one hundred thousand dollars damages. The defendants claimed that the Railway Spring Company was, in no sense liable to plaintiffs, there being no priority of contract between them, but, that the only right of action for any damages, if there were any, to plaintiffs was against the Detroit Company for breach of its contract with the plaintiffs.

Here then is the supreme issue in this class of cases. Is a party injured by outside interference with his contract relations confined to his action for breach of contract or may he sue in tort and recover damages, actual and punitive against the intermeddlers? The authorities are all now agreed that the party so injured has his choice of actions. Moreover, the court in the principal case holds that, if a fourth party should aid such third party in procuring such breach of contract he too is liable in tort. That was the rule on which the Detroit Company was held liable in tort and not for breach of contract. For the petition alleged that the Detroit Company procured The Railway Spring Company to organize and to make the pretended purchase from the Detroit Company in order to nullify plaintiff's contract.

On the question of the liability of "fourth parties," the court said: "It is unnecessary to say that, if it is an actionable wrong for a third party to maliciously interfere in a contract between two parties and induce one of them to break that contract to the injury of the other, then it is an actionable wrong for a fourth party to conspire with and aid and assist such third party in perpetrating the wrong. In such case the conspiring parties would both be liable as joint wrongdoers. Now, if one of the contracting parties devises a scheme to avoid his contract and escape performance and, perhaps, liability, by combining and confederating with a third person to pretend to transfer to him his property and the business to which the contract relates, making

known to such third person his contract obligations and his object and purpose, such third person to pretend to be the owner and to have the possession of and the management of the business and refuse to give employment or business to the other contracting party pursuant to the contract, and deprive him of gains, profits, and advantages already partially earned, and prevent his full performance so as to deprive him of what he is entitled to, and such third party enters into and becomes a party to the scheme, and for a consideration aids to carry it into full effect to the damage of the other party to the contract, can it be said that here is not a conspiracy to commit a wrong by deception and wrongful acts, and that it has been consummated by the joint action of both parties? If so, and the third party is liable for the wrong, why are not both parties liable? Can the contracting party escape by saying: "I have broken my contract, true, and your only remedy is an action for the breach of the contract?" Can the third party escape by saying: "All I have done is to aid one of the parties in violating his contract—a thing he might have done in any event—and the sole remedy of the injured party is an action in damages for breach of the contract against the party violating same?" This sophistry in this class of cases has been repudiated by the Supreme Court of the United States, and by the courts of many of the states, and by those of England.

The interesting point in this case is the question of the liability of the "fourth party." In this particular instance, the "fourth party" was the contracting party himself. His action in getting a third party to interfere with his contract with the plaintiff was in the nature of conspiracy and it was certainly a deliberate attempt to break his own contract. It is often more important, however, in such case to be able to sue in tort, rather than on a breach of contract, and the court in the principal case, has the following to say why the Detroit Company should be held liable in tort as well as for breach of contract: "If it be an actionable wrong for a third person to interfere in a contract and induce one of the parties

thereto to break it to the injury of the other, can it be said it is not equally a wrong for one of the parties to the contract to invite a third party to unite with him and aid him in breaking the contract in such a way as possibly to escape liability in an action for nonperformance and, gaining his consent, to act together in consummating their agreement? There are many refinements in the law, necessarily so, but courts should be as astute in applying well-known principles of justice to remedy wrongs as the wrongdoers are in devising schemes to perpetrate them."

NOTES OF IMPORTANT DECISIONS

ASSAULT AND BATTERY—ABUSIVE LANGUAGE OF PROSECUTING WITNESS TENDING TO MITIGATE DAMAGES.—It is not any character of abusive language that will justify a man in flying into a rage and striking another. This was clearly shown by the recent case of *Baumgartner v. Hodgdon*, 116 N. W. Rep. 1030. In this case, it appeared that, during an apparently friendly discussion of the merits of a certain horse owned by one of the parties, carried on by plaintiff, defendant, and others, plaintiff in a good-natured way remarked that the horse was "the damndest looking horse" plaintiff ever saw. Whereupon defendant flew into a passion and violently assaulted plaintiff, inflicting serious injuries to his person. The trial court charged the jury that the plaintiff's remark furnished no ground for the assault and could not be considered in mitigation of damages. The Supreme Court of Minnesota held that, though insulting and abusive language may ordinarily be considered in mitigation of damages in such cases, the particular language here shown to have been used does not bring the case within the rule, and the charge of the court was correct.

In the course of its argument the appellate court grows somewhat facetious, believing, no doubt, in the old saying,

A little nonsense now and then
Is relished by the best of men.

The court's unfavorable comparison between what is known as "horse sense" and the sense of some men in situations like the one presented in the principal case is quite interesting. The court said: "The language contains nothing whatever to prompt a person possessed of ordinary common sense and judgment to com-

mit a breach of the peace. The most that can be said of it is that it was disrespectful to the horse; but the horse was not present, and there was no horse trade on. Moreover, we have the right to assume that the animal was endowed by nature with the usual amount of "horse sense," and that, had the remark been overheard by him, he would have dismissed it without reply as the opinion of one not competent to speak on the subject. Therefore, as a matter of law, the remark could furnish no pretext whatever for the assault committed by defendant and was not a proper subject for consideration in mitigation of damages."

THE LAW OF THE CASE.

I. INTRODUCTORY.

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II. THE CALIFORNIA DOCTRINE.

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III. CRITICISM OF THE CALIFORNIA DOCTRINE.

I. *Introductory*.—The general doctrine, frequently announced by appellate courts, is that a ruling once made by the appellate court in a case, while it may be overruled, limited or modified in other cases, is binding in its entirety, both upon the inferior courts and upon the appellate court itself, in all future stages of that case, however erroneous the ruling may be; that in all subsequent proceedings in the cause, neither the lower court nor the court making the ruling can depart therefrom. A ruling or decision so made is said to be "the law of the case."

Some courts—among them the California supreme court, in the earlier cases—in assigning reasons for inflexibility and adhering, right or

wrong, to what is termed "the law of the case," have confounded the reasons from which three distinct legal maxims or rules of law have sprung up. These are:

1. "The law of the case"; 2. *Res judicata*; and, 3. *Stare decisis*.

"The law of the case" should be understood as applying to the precise point under consideration, in the same case, and between the same parties or their privies; and not another of exactly like import, but affecting different parties. A further qualification should also be added, and that is: The ruling or decision must be one necessary to the proper decision of the cause within the issues as framed, or must be expressly made for the guidance of the lower court in further proceedings, directed to be taken.

Res judicata means, literally, matter or thing adjudicated; a legal or equitable issue which has been decided by a court of competent jurisdiction; and includes not only the subject-matter thereby determined, but also every other matter the parties might have litigated and had determined under the issues as framed in the cause. All such judgments or decrees form a complete bar to a subsequent suit or action between the same parties, on the principle that the matter is *res judicata*.¹

To make a matter *res judicata* four distinct things must concur, to-wit: 1. Identity of the thing sued for; 2. Identity of the cause of action; 3. Identity of the persons and of parties to the action; and 4. Identity of the quality of the persons for or against whom the claim is made.

Stare decisis is to abide by, or adhere to, decided cases; *stare decisis et non quieta movere*. In other words, it is a general maxim that when a point has been once settled by a decision it forms a precedent which is not afterwards to be departed from; to abide by former precedents where the same point comes again into litigation and is presented again to the court, as well to keep the scales of justice even and steady, and not liable to waver with every new judge's opinion, as to make that which was before uncertain, or perhaps indifferent, permanent when the law is once solemnly declared, "which it is not in the breast of any judge to alter or swerve from according to his private sentiments; he being sworn to determine, not according to his own private judgment, but according to the known laws and customs of the land—not delegated to pronounce a new law, but to maintain and expound the old one."²

This maxim is supported on principle, and for reasons entirely different from those which apply either to the doctrine of "the law of the case" or the principles of *res judicata*. It is

(1) See *Le Guen v. Gouvenuer*, 1 John, Cas. (N. Y.) 502.

(2) *Broom's Leg. Maxims* (7th ed.), p. 147.

necessary, for the sake of the stability of the rights of property, that a settled rule should be observed. It is for this reason that erroneous decisions should be permitted to stand when their correction might occasion great confusion to titles and rights which have grown up under them, and thus produce a wider-spread injustice than would result from perpetuating the error.³

The reasons for the rule of stare decisis are thought to have no application to a case where no final decision has been made between the parties; where no rule of property has been established; where no rights have grown up under it; and where the question is, not only, whether a court shall knowingly commit a glaring wrong upon one of the parties by an erroneous application of the law to his case, but whether a precedent shall be thus established under which interests of the greatest magnitude may grow up, and that, too, before the court can have an opportunity of correcting their error in a subsequent cause between other parties.

II. The California Doctrine.—Rule as first announced—Qualifications.—The rule as to "the law of the case" was first enunciated in this state at the October term, 1852. On that occasion the court declared that "the previous decision of the appellate court in the same case becomes the law of the case, and is not subject to revision," although the former decision was declared to be "in abrogation of one of the plainest principles of law; and if this case was a new one, I would not hesitate to overrule it."⁴

The question next came before the supreme court at the October term, 1856, when Mr. Chief Justice Murray declared: "It is well settled that when a case has once been taken to an appellate court, and its judgment obtained on points of law involved, such judgment, however erroneous, becomes the law of the case, and cannot, on a second appeal, be altered or changed;"⁵ "not only in the court below, but in the appellate court whenever the case is again brought before it;"⁶ "from the consequences of which the court cannot depart;"⁷ "is, in all subsequent proceedings in the case, and so long as the facts appear without material qualification, a final adjudication of the rights of the parties, from which the court cannot depart nor the parties

relieve themselves."⁸ And the doctrine as thus broadly announced has been substantially followed in all subsequent cases in this state.⁹

At the January term, 1860, the court, through Mr. Justice Baldwin, began to "hedge" on the broad doctrine, limiting the application of the rule to those cases in which "the facts being the same."¹⁰ And the disposition shown by Mr. Justice Baldwin to limit the general doctrine has ever since existed, but the "hedging" has been done so conservatively that the rule still stands; the principal cases holding the rule insuperable. "But such ruling, if relating to a matter of fact, can only be invoked when the fact reappears under the same circumstances in which it was originally presented."¹¹

Where the supreme court, in reversing a judgment, passes upon a point of law, as resulting from the facts then before it, the rule that the law thus laid down becomes "the law of the case in all its stages," only applies so long as the evidence develops the same state of facts. If, on the new trial, the evidence shows a different state of facts from that shown on the first trial, the law of the case will be the application of the principles governing under the new state of facts developed.¹² "The judgment of the supreme court in a case becomes the law of the case in all its stages, unless the conditions on which it was founded are so changed as to render its accomplishment impracticable."¹³

The principles and rules announced by the supreme court on a former appeal will be recognized, on a subsequent appeal, as the law of the

(8) *Jaffe v. Skae*, 48 Cal. 540, 543; *People v. Hamilton*, 103 Cal. 488, 496, 37 Pac. Rep. 627.

(9) See *Gunter v. Laffan*, 7 Cal. 588, 592; *Soule v. Dawes*, 14 Cal. 247; *Davidson v. Dallas*, 15 Cal. 75, 82; *Crowell v. Gilmore*, 17 Cal. 194; *Phelan v. City and County of San Francisco*, 20 Cal. 39, 45; *Haynes v. Meeks*, 20 Cal. 288, 311; *Leese v. Clark*, 20 Cal. 388, 417; *Soule v. Ritter*, 20 Cal. 522; *Nieto v. Carpenter*, 21 Cal. 456, 488; *Table Mt. Tunnel Co. v. Stranahan*, 21 Cal. 548, 551; *Lucas v. City of San Francisco*, 28 Cal. 591, 594; *Estate of Pacheco*, 29 Cal. 224, 226; *Argenti v. Sawyer*, 32 Cal. 414; *Polack v. McGrath*, 38 Cal. 666; *Yates v. Smith*, 40 Cal. 662, 670; *McKinlay v. Tuttle*, 42 Cal. 570, 576; *Jaffe v. Skae*, 48 Cal. 540, 543; *Donner v. Palmer*, 51 Cal. 629; *Heinlen v. Martin*, 51 Cal. 181, 183; *Reclamation Dist. No. 3 v. Goldman*, 65 Cal. 635, 636, 4 Pac. Rep. 676; *Gwinn v. Hamilton*, 75 Cal. 265, 17 Pac. Rep. 212; *Porter v. Muller*, 112 Cal. 355, 366, 44 Pac. Rep. 729; *Wallace v. Sisson*, 114 Cal. 42, 44, 45 Pac. Rep. 1000; *Horton v. Jack*, 115 Cal. 29, 32, 46 Pac. Rep. 920; *Goodell v. Ashworth*, 115 Cal. 222, 229, 46 Pac. Rep. 1066; *Brind v. Gregory*, 122 Cal. 480, 483, 55 Pac. Rep. 250; *Kent v. San Francisco Sav. Union*, 130 Cal. 401, 404, 62 Pac. Rep. 620; *Raymond v. Glover*, 144 Cal. 548, 78 Pac. Rep. 3.

(10) *Davidson v. Dallas*, 15 Cal. 75, 82.

(11) *Nieto v. Carpenter*, 21 Cal. 456, 488.

(12) *Mitchell v. Davis*, 23 Cal. 381.

(13) *Estate of Pacheco*, 29 Cal. 224, 226.

(3) An analytical and exhaustive discussion of the California doctrine of stare decisis will be found in *Kerr's Cyc. C. C. P.*, note to Sec. 53, para. 312 to 375.

(4) *Dewey v. Gray*, 2 Cal. 374, 377, ruled on the authority of *Washington Bridge Co. v. Stewart*, 44 U. S. (3 How.) 413, bk. 11 L. ed. 658 (which the court failed to properly comprehend and misapplied). See *Hammond v. Ridgely*, 5 Harr. & J. (Md.) 279, 9 Am. Dec. 522.

(5) *Clary v. Hoagland*, 6 Cal. 685, 687.

(6) *Lucas v. City of San Francisco*, 28 Cal. 591, 594.

(7) *Heinlen v. Martin*, 59 Cal. 181, 183.

case, only where the same question is presented to it in the same state of facts.¹⁴

In 1862 this doctrine was persistently brought before the supreme court, its soundness questioned, and strenuously combatted in an effort to secure a modification thereof, but without any material modification of the rule. At the April term of that year Mr. Chief Justice Field reannounced the rule in the following language: "A previous ruling of an appellate court upon a point distinctly made may be only authority in other cases to be followed and affirmed, or to be modified or overruled, according to its intrinsic merits; but in the case in which it is made it is more than an authority—it is a final adjudication, from the consequences of which the court cannot depart, nor the parties relieve themselves,"¹⁵ declaring this to be the doctrine of the United States Supreme Court, and of other supreme courts.¹⁶ The same judge reiterates the doctrine in the subsequent cases of *Haynes v. Meeks*¹⁷ and *Leese v. Clark*.¹⁸

Illustrations of the rule.—In a chancery case, where all the proofs are in, and the case fully before the lower and the appellate court, the judgment of the latter is conclusive, where it passes upon the merits of the controversy; and on the reversal of the decision below, the trial court can take no further proceedings unless authorized by the appellate court, except such as are necessary to give effect to the judgment of the appellate court, whether the judgment be correct or erroneous; the whole matter is res judicata.¹⁹

Same—On construction of pleadings.—Where the pleadings remain unchanged, the construction given to them, upon a former appeal, becomes the law of the case upon a second appeal.²⁰

Same—On demurrer, ruling on.—A judgment or decree rendered upon demurrer to the complaint, upon a former appeal, is the law of the case, upon a second appeal, taken after a trial

of the cause, where the facts are the same upon both appeals.²¹

The issue must also be the same. Thus the decision upon a former appeal, rendered upon a demurrer to the complaint, that one who claimed to have been injured in his property, in consequence of the neglect of the superintendent of the streets in accepting a sewer not built according to specifications of the contract, has a right of action against the superintendent and the sureties on his bond is not "the law of the case" upon the trial of the issue as to whether the sewer was valueless for the purposes for which it was intended, and as to the amount of damages sustained by the plaintiff.²²

Same—On finding of fact.—The supreme court on a former appeal having found that A's attornment to B was void, such holding will be the law of the case, although such attornment was made in pursuance of the decision of a court of competent jurisdiction, that a patent issue to the land, and thus bringing the case clearly within the provisions of the statute of 1855. "As had been held by the supreme court in *Leese v. Clark*²³ years prior to the decision in *Thompson v. Pioche*²⁴ (in which the attornment to B was erroneously held void), and affirmed by the supreme court of the United States in *Beard v. Federy*,²⁵ the patent is record evidence of an adjudication, conclusive in its character, that B was entitled to the land sued for, from the date at least of the presentation of the claim to the land commissioners, against all persons in the condition of Thompson. This rule of *Leese v. Clark* is, no doubt, the settled rule of this state." Against this settled rule the court, in *Thompson v. Pioche*,²⁶ on the first appeal held—in contravention of the existing law of the state—that the attornment was void; yet, on the second appeal the supreme court says: "This decision, however erroneous, under numerous decisions of the supreme court of this state, constitutes the law of the case in all its stages."²⁷

Same—On injunction, ruling on.—When an appeal is taken from an order granting a preliminary injunction, and the order is reversed, the opinion of the court will not apply to a new state of facts which may appear in the record, on appeal from the final judgment.²⁸

Same—On oral agreement.—Decision upon former appeal, that an alleged oral agreement, even

(14) See *McKinlay v. Tuttle*, 42 Cal. 570, 576; *Donner v. Palmer*, 51 Cal. 629; *Reclamation Dist. No. 3 v. Goldman*, 65 Cal. 635, 636, 4 Pac. Rep. 676; *Huggin v. Clark*, 71 Cal. 444, 452, 9 Pac. Rep. 736, 12 Id. 478.

(15) *Phelan v. San Francisco*, 20 Cal. 39, 45, affirming *Davidson v. Dallas*, 15 Cal. 75, and quoted by Mr. Justice Field in *Leese v. Clark*, 20 Cal. 387, 417.

(16) *Citing Ex parte Sibbald*, 37 U. S. (12 Pet.) 488, 491, bk. 9 L. ed. 1168; *Washington Bridge Co. v. Stewart*, 44 U. S. (3 How.) 413, bk. 11 L. ed. 658; *Russell v. La Røge*, 13 Ala. 151.

(17) 20 Cal. 288, 311.

(18) 20 Cal. 387, 417.

(19) *Soule v. Dawes*, 14 Cal. 247, 249; *Crowell v. Gilmore*, 17 Cal. 194; *McLaughlin v. Kelly*, 22 Cal. 212, 222.

(20) *Auburn Opera House & P. Assoc. v. Hill*, 113 Cal. 382, 384, 45 Pac. Rep. 695.

(21) *Little v. Caldwell*, 112 Cal. 27, 31, 44, Pac. Rep. 340.

(22) *Goodsell v. Ashworth*, 115 Cal. 222, 230, 46 Pac. Rep. 1066.

(23) 18 Cal. 535 and 29 Cal. 387.

(24) 44 Cal. 508.

(25) 70 U. S. (3 Wall.) 478, 491, bk. 18 L. ed. 88.

(26) 44 Cal. 508.

(27) *Thompson v. Felton*, 54 Cal. 547, 554.

(28) *Trinity Co. v. McCommon*, 25 Cal. 117, 121.

if proved as alleged and found as a fact, would have been of no effect, is to be deemed the law of the case on a second appeal, even though the decision of the question was not absolutely necessary on the former appeal.²⁹

Same—On order granting new trial.—The decision of the appellate court, upon questions of law, in granting a new trial, or in affirming an appeal on an order granting a new trial, is the law of the case; and it is the duty of the lower court not to depart from the decision of the appellate court on the new trial.³⁰

Same—On reversal.—Where a judgment is rendered in the supreme court reversing the judgment in the trial court, and remanding the cause for further proceedings, it becomes the law of the case, and it must be adhered to, though erroneous.³¹

The doctrine here announced is thought to be especially vicious, because on a simple reversal the consequence is that the parties in the court below have the same rights which they originally had, stand in the place, in all respects, in which they stood at the commencement of the case, and the trial court should be left the same free hand it originally had, unless some matter for the especial guidance of the trial court is determined.³²

Same—What constitutes "the law of the case."—The "law of the case" consists, not in the reasonings of the court, or the illustrations given upon a former appeal, but in the propositions of law actually decided and applicable to the facts in judgment.³³

The rule of the law of the case applies when on a subsequent trial, the issue and the facts found remain substantially the same.³⁴

Reason for the doctrine is said to be: "The supreme court has no appellate jurisdiction over its own judgments; it cannot review or modify them after the case has once passed, by the issuance of the remittitur, from its control. It construes, for example, a written contract, and determines the rights and liabilities of the par-

ties thereunder, and upon such construction it affirms the judgment of the court below, the decision is no longer open to consideration; whether right or wrong, it has become the law of the case."³⁵ This may be the case where the court, on appeal, finally adjudicates a point, whether that adjudication be right or wrong, provided only it be within the issues and necessary to the disposition of the case, or for the guidance of the lower court on a retrial; but there is neither reason nor principle in applying it to a case in which there is a simple reversal and a remanding for a new trial de novo.

"In all questions of remedy, where the opinions of judges may be as various as the differences of the human mind admit of, the interposition of a new judge might change the law which has been settled by a majority for years, and introduce a new rule . . . The evil may extend to the pleading and practice in lower courts, and the whole administration of justice thrown into doubt and confusion by every change on the bench; but by letting those judgments stand which have already passed through this forum, no inconvenience can result, as new rules will only operate upon future, and not upon past controversies."³⁶

"The court cannot recall the case and reverse its decision after the remittitur is issued.³⁷ It has determined the principles of law which shall govern, and having thus determined, its jurisdiction in that respect is gone. And if a new trial is had in accordance with its decisions, no error can be alleged in the action of the court below."³⁸

Limitation of the doctrine.—But the rule as to "the law of the case" does not apply to a ruling or decision of the supreme court, upon a former appeal, in the following instances, to-wit:

1. To points not made or passed upon on the former appeal.³⁹

(29) *Porter v. Muller*, 112 Cal. 355, 366, 44 Pac. Rep. 729, citing *Table Mt. Tunnel Co. v. Stranahan*, 21 Cal. 549; *Leese v. Clark*, 20 Cal. 387; *Gwinn v. Hamilton*, 75 Cal. 265, 17 Pac. Rep. 212.

See post par. 17.

(30) *Lick v. Diaz*, 44 Cal. 479, 481; *Kent v. San Francisco Sav. Union*, 130 Cal. 401, 404, 62 Pac. Rep. 620. See *Creighton v. Hershfield*, 2 Mont. 170; *Daniels v. Andes Ins. Co.*, 2 Mont. 502; *Venard v. Green*, 4 Utah 456, 458, sub nom. *Venard v. Old Hickory Min. Co.*, 6 Pac. Rep. 416, 7 Id. 408.

See note to 27 Am. Dec. 634.

(31) *Gunter v. Laffan*, 7 Cal. 588, 592.

(32) See *Phelan v. City of San Francisco*, 9 Cal. 16; *Stearns v. Aguirre*, 7 Cal. 443; *Argenti v. City of San Francisco*, 30 Cal. 458, 462; *Ryan v. Tomlinson*, 39 Cal. 646.

(33) *Heldt v. Minor*, 113 Cal. 385, 390, 45 Pac. Rep. 700.

(34) *Heldt v. Minor*, supra.

(35) *Field, J.*, in *Leese v. Clark*, 20 Cal. 387, 417.

(36) *Heldt v. Minor*, 113 Cal. 385, 390, 45 Pac. Rep. 700.

(37) *Heldt v. Minor*, supra.

(38) *Field, J.*, in *Leese v. Clark*, 20 Cal. 387, 417.

(39) *Clary v. Hoagland*, 6 Cal. 685, 688.

(37) The doctrine of remittitur or mandate in this state is fully treated in *Kerr's Cyc. C. C. P.*, p. 56 (pars. 249 to 267) and p. 1476, pars. 13 to 17.

(38) *Leese v. Clark*, 20 Cal. 387, 417, citing *Young v. Frost*, 1 Md. 394; *McClelland v. Crook*, 7 Gill & J. (Md.) 338.

(39) *Anderson v. Handcock*, 64 Cal. 455, 2 Pac. Rep. 31; *Ehrlich v. Ewald*, 66 Cal. 97, 98, 4 Pac. Rep. 1062; *People v. Hamilton*, 103 Cal. 488, 496, 37 Pac. Rep. 627; *Tuffree v. Sterns Ranch Co.*, 124 Cal. 306, 310, 57 Pac. Rep. 69.

2. To decisions of the appellate court upon questions of fact.⁴⁰

3. To a ruling unnecessary to a decision of the cause.

4. To dicta.

Where the facts appearing upon the second appeal do not differ from those disclosed upon a former appeal, the decision upon the proposition of law, based upon those facts, rendered upon the former appeal, is the law of the case, and is decisive upon the second appeal.⁴¹

Same—Unnecessary Ruling.—A ruling unnecessary to the decision of the cause, where made with a view to a new trial, for the purpose of which it is important, being a matter necessarily involved in the issue to be tried, the doctrine of res judicata is applicable, and such ruling becomes the law of the case in all its future stages, whatever doubt may exist in regard to the correctness of the conclusion arrived at.⁴²

Same—Dicta Not Protected by Rule.—Dicta are not protected by the doctrine of "the law of the case."⁴³ "A decision upon a point which arises in the case, and was decided, is not dictum, although it was not necessary to the decision of the appeal."⁴⁴

III. *Criticism of the California Doctrine.*—The California rule as above reviewed has not gone unchallenged, either at home or abroad; but it has been adapted and followed in many of those jurisdictions which have a similar jurisprudence and look to California decisions for counsel and guidance. Among those jurisdictions adopting the California rule is the state of Nebraska;⁴⁵ and from Nebraska comes the most

searching, scholarly and scorching criticism of the rule.

In the case of *Hastings v. Foxworthy*,⁴⁶ the Nebraska court broke away from the California rule in a very exhaustive and able opinion by Mr. Commissioner Irvine, in which he reviews all the former Nebraska decisions, and declares that the doctrine in *Hiatt v. Brooks* (the first Nebraska case following the California doctrine) was "expressly adopted from *Phelan v. San Francisco*,⁴⁷ and in all subsequent cases it has been based solely upon the authority of *Hiatt v. Brooks*. It may be said, then, that we have adopted the doctrine from California, and we shall look first to the decisions of that state. The case in which we first find the rule announced in California is that of *Dewey v. Gray*.⁴⁸ It would seem from the report that the case had once before been before the supreme court, but we have been unable to find the first decision reported. The action was one for rent, to which it was pleaded that the landlord had re-entered before the expiration of the lease, and relet the premises to another. The court says that it before held that the re-entry and reletting discharged the tenant from his covenant, with the exception that the landlord was still entitled to recover any rent which had accrued at the time of the re-entry. Then follows this remarkable language: 'The latter portion of the decision is in abrogation of one of the plainest principles of law, and if the case was a new one I would not hesitate to overrule it; but legal rules deprive us of the power to do so. The decision having been made in this case, it has become the law of the case, and is not now subject to revision.' The sole authority cited in support of this radical statement is *Washington Bridge Co. v. Stewart*,⁴⁹ a case which we shall show hereafter is not in point, and depends upon entirely different principles, which the California court, as well as others, seems to have overlooked. Hardly less remarkable than the language here used is the fact that it was manifestly obiter. The jury had found a verdict for the full amount of the rent claimed. Under the instructions, this involved a finding that there had been no re-entry; so it was entirely immaterial to the decision of the case whether, in case of a re-entry, recovery could be had for rent accrued to that time. But behold to what length a too rigid adherence to the doctrine of stare decisis may lead us!

"In *Clary v. Hoagland*,⁵⁰ the action was one of forcible entry, and had begun in the county court, where judgment had gone in favor of the plaintiff. The supreme court reversed the judgment, and remanded the cause for a new trial.

(46) 45 Neb. 676, 63 N. W. Rep. 955.

(47) 20 Cal. 45.

(48) 2 Cal. 374.

(49) 44 U. S. (3 How.) 413, bk. 11 L. ed. 658.

(50) 6 Cal. 685.

(40) *Mitchell v. Davis*, 23 Cal. 381; *Sneed v. Osborn*, 25 Cal. 619, 625; *Nieto v. Carpenter*, 21 Cal. 483; *McLeran v. Benton* 73 Cal. 329, 335, 2 Am. St. Rep. 864, 14 Pac. Rep. 879; *Penson v. Shotwell*, 103 Cal. 168, 37 Pac. Rep. 147; *People v. Hamilton*, 103 Cal. 488, 396, 37 Pac. Rep. 627; *Mattingly v. Pennie*, 105 Cal. 514, 45 Am. St. Rep. 87, 39 Pac. Rep. 200; *Wallace v. Sisson*, 114 Cal. 42, 45 Pac. Rep. 1000.

(41) *Horton v. Jack*, 115 Cal. 29, 32, 46 Pac. Rep. 920, following *Benson v. Shotwell*, 103 Cal. 168, 37 Pac. Rep. 147.

(42) *Table Mt. Tunnel Co. v. Stranahan*, 21 Cal. 548, 551; *Gwinn v. Hamilton*, 75 Cal. 265, 17 Pac. Rep. 212—ruling on sufficiency of complaint in first appeal. See ante par. 6.

(43) *Gwinn v. Hamilton*, 75 Cal. 265, 17 Pac. Rep. 212.

(44) *Gwinn v. Hamilton*, supra; citing *Table Mt. Tunnel Co. v. Stranahan*, 21 Cal. 551; *City and Co. of San Francisco v. Spring Valley Water Works*, 53 Cal. 608, 611; *Onley v. Sawyer*, 54 Cal. 379, 385; *Camron v. Kingfield*, 57 Cal. 550, 553.

(45) *Hiatt v. Brooks*, 17 Neb. 33, 22 N. W. Rep. 73; *Donohue v. Hendrix*, 17 Neb. 287, 22 N. W. Rep. 548; *Leighton v. Stuart*, 19 Neb. 546, 26 N. W. Rep. 198; *Love v. Starkey*, 20 Neb. 586, 31 N. W. Rep. 238; *Marion v. States*, 20 Neb. 333, 57 Am. Rep. 825, 29 N. W. Rep. 911; *Chicago B. & Q. R. Co. v. Hull*, 24 Neb. 740, 40 N. W. Rep. 280; *Meyer v. Shamp*, 26 Neb. 729, 42 N. W. Rep. 757.

The case was again presented to the supreme court on certiorari to review proceedings wherein the county court had, by mandamus, commanded the clerk to issue a writ on the original judgment. A motion to dismiss the writ was denied, and a rehearing was allowed on the question as to whether the former judgment was conclusive on the parties, the supreme court having in the meantime determined that in such case the district court had no appellate jurisdiction, and the case having been first brought to the supreme court through the district court by an attempted appeal. Here, it will be observed, the court was called upon to say whether or not in a subsequent proceeding in a case the parties and the court were bound by a decision announced in an appeal over which the supreme court had no jurisdiction. The court again cited *Washington Bridge Co. v. Stewart*, and carried the doctrine of *Dewey v. Gray* to its logical conclusion, holding that, although it had no jurisdiction in such cases, still, having in this particular case entertained jurisdiction, the parties were bound by the result. Not only this, the question of jurisdiction was not raised on the former hearing, but the court said that it must always be implied that a court at the very first decided the question of its jurisdiction, and, having entertained the case on its merits, the question of jurisdiction must be considered as having been decided, although not in fact raised or considered.

"In *Davidson v. Dallas*⁵¹ the doctrine was again stated very nearly in the language in which it appears in some of the Nebraska cases. *Dewey v. Gray* is quoted at length, and in addition thereto there are cited *Washington Bridge Co. v. Stewart* and several other cases in the supreme court of the United States. Also *Hosack v. Rogers*,⁵² *Stiver v. Stiver*,⁵³ *Booth v. Commonwealth*,⁵⁴ and *Russell v. Laroque*.⁵⁵ Only one of these cases, we shall undertake to show, was in point. The case we are considering is, however, noteworthy as being one of a very few cases in which the court has attempted to give a reason for such a rule of law, and the reason given is that, after a mandate, the appellate court loses jurisdiction over the case, and that questions decided leading to the judgment and mandate constitute a final adjudication. This reason is undoubtedly sound as applied to a certain class of mandates, and is illustrated in a class of cases which the California court has considered as supporting its doctrine. But we cannot see how it is applicable to a mandate reversing a case and remanding it for a new trial. In the latter instance the whole case is tried

anew, and nothing is settled by the first appeal beyond the fact that the first trial was erroneous, and that all the issues must be tried again.

"The case of *Phelan v. San Francisco*⁵⁶ being the only case which our court has cited in support of the doctrine, states it in the language of the syllabus in *Hiatt v. Brooks*, citing *Davidson v. Dallas*; but there is no discussion of the doctrine. In the same volume, however, appears the case of *Leese v. Clark*,⁵⁷ where Judge Field delivered the opinion of the court, and again stated the doctrine. He says that the court entertained no doubt of the correctness of the former decision; then cites *Dewey v. Gray*, and the other California cases, and three of the cases cited in *Davidson v. Dallas*. The reason is stated to be that the court, by its mandate, abandoned jurisdiction of the first appeal, and lost the power to modify its judgment therein expressed.

"A number of California cases later than the twentieth volume of the California reports might be cited supporting the contention of Foxworthy. It will not be necessary to review them. It is sufficient to say that the California court has, by repeated decision, adhered to that doctrine, and that all of these cases fairly support Foxworthy's contention. In as much as our cases, if adhered to, based as they are on the authority of California, would require a decision herein in favor of Foxworthy, we have reviewed the California cases down to the twentieth volume of reports, at which point our court adopted them, for the purpose of showing that they originated in California in an obiter dictum, and that California traces the doctrine to certain cases in the supreme court of the United States and elsewhere, which do not support the doctrine; and for the further reason of showing that the California court has given a reason for its decisions applicable to those cases which it cites, and furnishing a sufficient ground for those decisions, but which does not apply in any way to the cases decided in California.

"The California doctrine is not without support in the decisions of some other states. In *Russell v. Laroque*,⁵⁸ the opinion opens as follows: 'This cause has been tried before this court, and the rules applied to it then is the law of it now.' In better English, but just as bluntly, the same court said in *Thomason v. Dill*,⁵⁹ that propositions laid down on a former appeal 'are the law of this case, and must not be lost sight of.' In neither case was any doubt expressed as to the correctness of the former decision, and there is no discussion of the rule announced.

"In *Rector v. Danley*,⁶⁰ the opinion opens

(51) 15 Cal. 75.

(52) 25 Wend. (N. Y.) 313.

(53) 3 Ohio, 18.

(54) 48 Mass. (7 Met.) 286.

(55) 13 Ala. 161.

(56) 20 Cal. 39.

(57) 20 Cal. 388.

(58) 13 Ala. 149.

(59) 34 Ala. 175.

(60) 14 Ark. 304.

with a statement that it is a settled doctrine that a decision made when the cause was in the court before is the law of the case, and nothing then determined can be reviewed. Here, again, no authority is cited, and no reason is given. Precisely of the same nature is the case of *Mynning v. Detroit, L. & N. R. Co.*⁶¹

"The doctrine has also been adopted in Indiana, the rule being stated there also unaided by argument or authority.⁶² The doctrine also receives apparent support in the case of *Hill v. Hoover*⁶³ and *Pierce v. Kneeland*,⁶⁴ although both of those cases might have been solved under a strict and correct application of the doctrine of *res adjudicata*. Of the same character is the case of *Hopkins v. Hopkins*.⁶⁵ In none of these cases was the first reversal general, but the cause was remanded with certain features finally adjudicated, so that they could not again properly arise in the further proceedings in the case.

"In *Stacy v. Railroad Company*,⁶⁶ the court, while intimating some doubt as to the correctness of the doctrine, states that it had been so long established that it will not be departed from; but also states the reason for it to be, in the first place, that the former decision has the same weight as authority as a decision in another case, and, in the second place, that it is an adjudication between the parties. The latter reason is the only one which could be advanced for holding the decision conclusive upon the court; and the Vermont court says that it is not conclusive as a matter of law, because the court may revise and reverse it. Thus the case is, after all, ambiguous, leaving the former decision in scarcely any stronger position than a decision of the same question between other parties.

"In *Semple v. Anderson*,⁶⁷ the rule seems to be for the first time in Illinois announced, and the court cites in support of its conclusions the cases in the supreme court of the United States cited by the California court, and *Booth v. Commonwealth*.⁶⁸ As we have already stated, we shall show that these cases are based upon a different principle, which is illustrated by the case of *Hollowbush v. McConnel*.⁶⁹ In that case the opinion was by Judge Trumbull. On the former appeal the cause had been remanded for certain specified proceeding not remanded for a new trial generally. In the inferior court an effort was made to relitigate the questions

which had been finally determined by the first appeal, and which were not within the scope of the mandate. The court properly held that these issues were *res adjudicata*, and cited *Washington Bridge Company v. Stewart*,⁷⁰ which is in point on this proposition. Unfortunately, however, in *Cook v. Morton*⁷¹ the court, on the sole authority of *Hollowbush v. McConnel*, applied the doctrine to a case remanded generally for a new trial, losing sight of the distinction between a final order adjudicating an issue and an order remanding a case for a new trial throughout, leaving all issues still undetermined. Later Illinois cases have followed the doctrine in *Cook v. Norton*, the question not seeming to have ever again been examined on its merits."

Mr. Commissioner Irvine then examines the doctrine on principle, discussing many authorities, and arrives at the conclusion—and the supreme court of Nebraska so held—that "an appellate court, on a second appeal of a case, will not ordinarily re-examine questions of law presented by the first appeal; but where the case was, on the first appeal, remanded generally for a new trial, and the same questions are presented on the second trial, the appellate court is not bound to follow opinions on questions of law presented on the first appeal, and may re-examine and reverse its rulings on such questions, and should do so when the opinion first expressed is manifestly incorrect."

It is submitted that the conclusion arrived at by Mr. Commissioner Irvine is sound in principle, and should be the law in every state. The existence of a different rule in our state, as well as in other jurisdictions, is manifestly based upon a misconception of the real principles enunciated in the cases relied upon as authority for the California doctrine, and a failure to properly grasp, distinguish and apply the doctrine of *res judicata*.

JAMES M. KERR.

San Francisco.

(70) 44 U. S. (3 How.) 413, bk. 11 L. ed. 658.
(71) 61 Ill. 285.

CHARITIES—PARTIAL INVALIDITY.

VAN SYCKEL v. JOHNSON.

Court of Chancery of New Jersey, Aug. 13, 1908.

By a codicil to his will testator gave to his executors \$6,000 in trust, to be invested and the interest to be applied to keeping in good repair and condition that part of the graveyard attached to a certain church wherein his family were buried, and also the rest of the graveyard, and, if the church should fail to make up the salary of the pastor, the balance of the interest, or so much as necessary, should go toward the salary,

(61) 67 Mich. 677, 35 N. W. Rep. 811.

(62) *Kress v. State*, 65 Ind. 106; *Railway Co. v. Hixon*, 110 Ind. 225, 11 N. E. Rep. 285; *Insurance Co. v. Houser*, 111 Ind. 226, 12 N. E. Rep. 479.

(63) 9 Wis. 12.

(64) 9 Wis. 19.

(65) 40 Wis. 462.

(66) 32 Vt. 561.

(67) 9 Ill. (4 Gilm.) 546.

(68) 48 Mass. (7 Met.) 286.

(69) 12 Ill. 203.

Held, that the entire bequest is void, because it includes an object of charity (that is a contribution toward the salary of the pastor of a church, which is a good bequest), and an object not charitable (that is, a provision for keeping a graveyard in order), which is void as a perpetuity, and, the gift being indivisible, the whole is bad for uncertainty.

WALKER, V. C.: This bill was filed by the surviving executor and trustee under the will and codicil of the late Aaron Van Syckel, and by other persons beneficially interested in the estate of the testator as residuary legatees, for the construction of the second codicil to the testator's will, and for direction as to the distribution of the trust fund therein created, in case that provision of the codicil shall be held to be invalid. So much of the codicil as is pertinent to this inquiry reads as follows: "Second, I give and bequeath to my executors, or the survivors or survivor of them, the sum of six thousand dollars, in trust, nevertheless, that they or the survivors or survivor of them will invest the sum, either in good railroad securities or good and sufficient bond and mortgage on real estate as in their judgment they may think best, and pay the interest accruing thereon annually, first, to keeping up in good repair and condition that part of the graveyard attached to the Bethlehem Baptist Church, where my family are buried; second, to keeping up in good condition and repair the rest of said graveyard; third, if said Baptist Church shall fail to make up the salary of the pastor of said church, that then in that case the balance of said interest, or so much of it as is necessary, shall go towards making up the salary of said pastor; and in case the balance of said interest shall be more than is necessary for that purpose, then the balance of said interest remaining, after the payment of the said salary, shall be added to the fund of six thousand dollars from year to year, and the interest arising from such fund shall be appropriated and invested as is hereinbefore directed—the said several sums to be paid by my executors, or the survivors or survivor of them, either to the persons entitled to receive the same, or to the trustees or trustee of said church, as they shall think proper, and the receipt of the person or persons entitled to receive said interest, or the receipt of the said trustees, or any one of them, shall be a sufficient voucher for the same. And in case the said Baptist Church shall go down, or there shall be no regular Baptist Church service held in that place, then, after keeping the said graveyard in condition and repair as aforesaid, the balance of said interest shall be divided as I have directed the residue of my estate to be divided in my said will to which this is a codicil; and

in case both church and graveyard, shall go down and become extinct, then it is my will and I do order and direct that the whole sum of six thousand dollars, with whatever additions may have been made thereto, shall revert, and go back, and be considered as part of my estate, and be divided as the residue of my estate is ordered to be divided by said will, to which this is a codicil."

The defendants are the trustees of the Bethlehem Baptist Church and also those residuary legatees under the testator's will who are not complainants in the cause. None of the defendants answered, and the bill was taken as confessed, to the end that such decree might be made as the Chancellor should think equitable and just. The cause was brought on for hearing by the complainants ex parte, and two of the defendants, Daniel Johnson and William E. Johnson, trustees of the Bethlehem Baptist Church, were examined as witnesses. They testified that David Beers, the other trustee, who was made a defendant, was not a member of the church, having taken his letter and joined another church; that there were formerly five trustees, but the others have not acted for four or five years, the last election being held about six years ago; that there were about 45 members, scattered through a farming community; that the last meeting of the board was held five or six years ago; that they have had no regular pastor since the spring of 1904, after which time they procured a supply, who preached every two weeks until the fall of that year (1904), since which time they were without a pastor or any services until the summer of 1907; that during the month of July (1907) they arranged with a pastor for preaching every two weeks in the afternoon of Sundays, at no stated salary, but whatever they could afford to pay; that on August 18, 1907, the members extended the supply pastor a call, no salary being fixed, and he accepted and was to preach Sunday afternoons every two weeks, but he has not been paid, for the reason that they have not had funds wherewith to pay him; that the graveyard is in good shape, having been taken care of by some one other than the trustees—in fact, by one of the Van Syckel family, but not out of the fund in question; that they have no regular sexton; that the woodwork of the church, a stone one, has not been painted for about 50 years; that what work has been done to the fences has been done by the Van Syckel family; that without the income from the trust fund they cannot run the church, there not being people of sufficient means (members or not members) to do it, and very little money can be raised; that they are desirous of keeping up the church, but cannot

do so without the aid of the fund, for the reason that without its aid the pastor preaching every two weeks will leave, as they cannot raise sufficient moneys to pay him; that other churches have been built (in the vicinity, presumably), and members have moved away and died since the raising of the trust fund by the late Mr. Van Syckel, leaving the church in question in a weak condition.

It is not necessary to decide whether, within the meaning of the codicil, the church was gone down, or that there are no regular Baptist Church services held here, so that, after keeping the graveyard in condition and repair, the balance of interest, arising from the fund, may be divided as the testator directed concerning the distribution of his residuary estate, or whether both the church and graveyard have gone down and become extinct, so that the whole of the trust fund, with its additions, if any, shall revert to and be considered a part of the estate of the testator, to be divided as provided for the disposition of his residuary estate, because, in my judgment, the bequest is void as a perpetuity. In *Hartson v. Elden*, 50 N. J. Eq. 522, 26 Atl. 561, Chancellor McGill held that a provision by a testator that the interest of a certain portion of his estate should be used to keep in repair the grave of his wife and himself, and that the remainder of the interest should be employed in the general improvement of the cemetery, were void under the rule against perpetuities, because neither trust was for a public charity, which ordinarily is not within the rule referred to, for the trusts under consideration extended no farther than the establishment, preservation, and improvement of private property. To the same effect is *Corle's Case*, 61 N. J. Eq. 409, 48 Atl. 1027, in which Vice Chancellor Reed held that a gift by a testator to his executor of a certain sum to apply the interest in keeping his burial lot in good order, and any surplus remaining to be used to repair fences around the graveyard, was void as an attempt to create a perpetuity, being neither a charitable bequest, nor a gift to a cemetery association, under Gen. St. 1895, p. 351, sec. 14.

It will be noticed that the bequest under consideration is not only for the keeping of graves in condition and repair, which is not a charitable use, but also to be applied toward the payment of the salary of the pastor of the church, if the church shall fail to make up the salary of the pastor. This is a gift for the maintenance of religious services, and is undoubtedly a charity, and, therefore, not subject to the rule against perpetuities (*Mills v. Davison*, 54 N. J. Eq. 659, 35 Atl. 1072, 35 L. R. A. 113, 55 Am. St. Rep. 594); but there is here a mixing of charitable uses with objects

not charitable, and it is therefore void (*Thomson's Ex'rs v. Norris*, 20 N. J. Eq. 489). In *De Camp v. Dobbins*, 31 N. J. Eq. 671, a trust to a church, to aid the missionary, educational, and benevolent enterprises to which the church was in the habit of contributing was upheld only because it was shown that the enterprises referred to were legal charities; Chief Justice Beasley, who delivered the opinion of the Court of Errors and Appeals, remarking (at page 694): "It is urged that this entire trust cannot be said to be charitable, within the legal signification of that term, inasmuch as the word 'benevolent,' by its natural force, takes in objects and purposes that are not charities. That this term has this latitudinarian meaning was, upon full consideration, decided by this court in the case of *Thomson's Ex'rs v. Norris*, 20 N. J. Eq. 489. That exposition went on the ground of the intrinsic meaning and the unchecked form of the term, for on that occasion it was considered that there was nothing present tending to hem in or narrow its import." And at page 696: "It appears in the case, by the proofs, that this church has been in the habit of making donations to certain enterprises and objects, such as the foreign and domestic missions, the Bible Society, etc., all of which enterprises are charities in the legal sense of the term. When therefore, this will declares the trust, and directs the property to be used to aid the missionary, educational, and benevolent enterprises to which the said church is in the habit of contributing, the will itself provides a standard by which the word 'benevolent' is to be measured. The fund is not to be used to aid any benevolent enterprise, but only benevolent enterprises of a certain defined character, and they are charities. The word 'benevolent' is thus, by the context and the subject-matter, cut down into legal dimensions. From the first I have seen no difficulty on this point."

Like the trust which was held bad in *Thomson's Ex'rs v. Norris*, 20 N. J. Eq. 489, the trust in this case is for purposes charitable and not charitable, and therefore the bequest is bad for uncertainty. When an unascertainable part of a fund is given upon a void trust, and the residue upon a valid trust, the whole fails. *Kelly v. Nichols*, 17 R. I. 306, 21 Atl. 906, affirmed 18 R. I. 62, 25 Atl. 840, 19 L. R. A. 413. A deliverance precisely in point is that of the Supreme Court of Errors of Connecticut in *Colt v. Comstock*, 51 Conn. 352, 50 Am. Rep. 29, in which the court held that bequests to two ecclesiastical societies, to be invested as a permanent fund, and the income, so far as necessary, to be applied in keeping certain burial lots in order, and the remainder to re-

ligious services in the societies, was void, remarking at page 386 of 51 Conn. (50 Am. Rep. 29): "But the bequests as they are, although some portion of the income is to be devoted to a charitable purpose, cannot be supported. If it were otherwise, it would be in the power of an individual to make a perpetuity of property to any extent, by devoting some small portion of the undivided income thereof to some charitable purpose. A little charity, in such a case, cannot preserve the entire bequest."

There will be a decree declaring the codicil to the will of the late Aaron Van Syckel to be null and void, and that the trust fund raised by the codicil be distributed as the residue of the decedent's estate is ordered to be divided by his will. As the proofs show the amount in the hands of Judge Van Syckel, the surviving executor, the decree to be entered in conformity with these views may ascertain the exact amount distributable.

NOTE—Where Part of Charitable Bequest is Valid and Part Invalid, Does the Whole Bequest Become Void?—The law as to charitable trusts created by deed or will is in a state of considerable confusion in this country. Just how far the statute of 43 Eliz. giving equity jurisdiction to effectuate such trusts has become a part of the jurisdiction of our courts of equity is a disputed question. Even the Supreme Court of the United States has taken both sides of this question. So also the questions as to the degree of certainty required and the extent of the power of courts of equity under the *cy pres* doctrine, to carry out the intention of donor or testator where the specific charity fails or becomes impossible are all questions on which courts in the several states have reached widely different conclusions. Beginning with New York which has definitely rejected the *cy pres* doctrine and virtually deprived trusts for charity of all their distinguishing characteristics and ending with Kentucky, where the statute of 43 Eliz. is held to be part of the common law and where a high degree of indefiniteness in objects and beneficiaries is allowed, the courts of the various states line up with more or less uncertainty as to their exact attitude toward such trusts.

In England, where the attitude of the courts towards charitable trusts is extremely liberal, the rule as to partial invalidity in the objects of a charitable trust, which constitutes our particular inquiry in this annotation, is as follows: If an *unascertainable* portion of a fund be given upon a void trust and the residue upon a valid trust, the whole fails. *Chapman v. Brown*, 6 Ves. Jr. 404; *Fowler v. Fowler*, 33 Beav. 616; *In re Taylor*, 68 L. T. Rep. (N. S.) 538; *Limbrey v. Gurr*, 6 Madd. 151; *Attorney General v. Hinxman*, 2 Jac. and W. 270; *Cramp v. Playfoot*, 4 Kay and J. 479.

Believing, as we do, that the liberal attitude of the English courts is not only the proper attitude, but the one authorized by and obtaining at common law and therefore part of the law of every state which has adopted the decisions and statutes of England prior to 1607, we are prepared to say that the English rule, as just indicated,

for determining the question of whether a charitable trust shall fail where it happens to be unfortunately coupled with another bequest which is void, is the only proper rule which will solve all such questions most equitably and in most proximate accord with the intention of the testator.

While the rule which we have just stated is not always easy of application, we are nevertheless constrained to believe that under the application of such rule the decision in the principal case is clearly erroneous. We take this position for the reason that where the void bequest is given as in the principal case, to any such purpose as caring for a particular grave or graveyard, the amount of the bequest that might have been necessary for such a purpose is clearly ascertainable and the balance should be set aside for the benefit of the valid use to which the testator bequeathed it. For, it would not be questioned for a minute, that, if the testator in the principal case, had set aside a definite amount, say the income on two thousand dollars to the care of the graveyard mentioned and the balance of the income to be contributed to the expense of a certain church, the latter bequest would have been perfectly valid. If, therefore it could be clearly shown by competent evidence, that it would have taken just about the income on two thousand dollars to have cared for the graveyard mentioned in the manner provided for in the will, is not the amount of the invalid portion of the bequest sufficiently "ascertainable."

Our position, we believe, is amply supported by the splendid reasoning of the court in the great case of *Kelly v. Nichols*, 17 R. I. 306, cited by the court in the principal case in support of its own position. In that case the testator, with abundant expressions of pious wishes, devised his estate to trustees in trust, first, to keep in repair the graves of his sisters and himself; second, to keep his clock in repair; third, to keep his house open for the reception of traveling preachers of a certain denomination; fourth, to reprint and publish certain religious books for general distribution. The court found all but the fourth bequest invalid as charitable uses, but was unable to segregate the last bequest from the others, simply because of the fact that the amount of the third bequest was *unascertainable*. The court in referring to the English rule above set forth, to-wit: that "if an unascertainable portion be given upon a void trust, and the residue upon a valid trust, the whole fails," goes on to say: "This rule is based upon the reason that the whole gift is void by reason of the uncertainty of its parts. If the whole income could be spent upon the invalid trust, there would be no surplus for charity. If the court were to assign a definite proportion to the charity, it might be more or less than the testator intended, and so it would be the court's bequest rather than the testator's. In the present case the cost of the care of the burial lot could be *easily ascertained*, if it were material, and also the cost of keeping the clock in order; but the portion required for hospitality is unascertainable. It depends upon the numbers who may apply for it, and upon the judgment of the trustees. . . . The whole income *might* be applied to hospitality, and where, under a will, a bequest *might* be applied to other than charitable uses, the bequest is invalid."

The difficulty in this class of cases does not

lie in the fact that valid and invalid bequests are joined together in the same clause. A large number of cases might be cited to the self-evident proposition that where a testator gives a definite amount to a valid charitable purpose and another definite amount to an invalid purpose, the court will not permit the former bequest to fail merely because joined in the same clause with the invalid bequest. The only difficulty, therefore, in determining whether an indefinite invalid provision has tainted the entire bequest lies in the further inquiry, whether the amount of the valid bequest can be by any means, ascertainable. Assuming a liberal attitude toward trusts of this character, which we believe to be the proper attitude, we are of opinion that courts should strive earnestly to effectuate a testator's valid charitable intentions in such cases wherever evidence can be produced to show with sufficient definiteness the amount intended by the testator to be set aside for any particular valid charitable purpose.

ALEXANDER H. ROBBINS.

NEWS ITEM.

REPORT OF THE MEETING OF THE ASSOCIATION OF THE ATTORNEYS GENERAL OF THE UNITED STATES.

The second meeting of the Association of the Attorneys General of the United States was held in Denver on Thursday and Friday the 20th and 21st of August, in the Court of Appeals room at the State Capitol.

Beside the attorneys and assistants representing the various states, many members of the National Bar Association on their way to the meeting of that body at Seattle were in attendance as well as many local celebrities and distinguished men from other states, so that the capacity of the commodious quarters chosen for the meeting was taxed to its full extent.

The papers, all of which were exceedingly able, were discussed with spirit by the guests—the bars being let down and a free field opened to all.

The annual address of General Hadley of Missouri, who has made while occupying the office of Attorney General a national reputation and who is a candidate for Governor of the State of Missouri at the approaching election, took a wide range. He made a most logical and eloquent address, urging the members of the association to stand together and fight for uniform laws regulating great corporations, railroads and trusts. He struck a hard blow at the monopolistic interests by showing clearly that under the present methods of legal procedure, giant combines had all the advantage of the people and urged the enactment of legislative reforms to avoid this impediment to justice. He told of the progress made in co-operation by the four states, Missouri, Kansas, Oklahoma and Texas in the investigation and prosecution of the lumber trust; also of the joint effort of a number of States in the Central West in resisting the efforts of the railroad companies to contest the two-cent fare law which was adopted by some fifteen states in 1907. He explained that notwithstanding the immense advantage accorded to the railroad companies by the Federal decree in the Young case, which enables

a railroad or other public service corporation to secure an injunction suspending the operation of a state law because unremunerative, that the railroad companies had been slow to institute suits to overthrow the two-cent fare laws, because as a matter of fact most of the railroads east of the Rockies had been carrying their passengers at a rate of two cents per mile, or less, and the two cent fare law in many instances has resulted in an actual increase in passenger earnings.

Mr. Hadley reviewed with scathing irony the decision of the circuit court of appeals by Judge Grosscup, reversing the judgment of Judge Landis in imposing the \$29,000,000.00 fine, closing that part of his address as follows: "To deny that in a criminal case a judge can and should, in fixing the amount of the fine, consider the financial condition of the defendant, is to deny the correctness of a rule of law as old as our jurisprudence and our courts. And to assert that men may, by the organization of a puppet corporation, escape the proper measure of punishment for their wrongdoing, is to give the legal fiction of the corporation greater rights, privileges and immunities, than those which belong to natural persons. The judge who cannot see Standard Oil Co. of New Jersey in the Standard Oil Co. of Indiana, and who cannot see through both of these legal fictions to the real owners and the real offenders, John D. Rockefeller, H. H. Rogers, John D. Archibald and others, is either blinded by prejudice or an unfortunate disposition to obscure the merits of a controversy by strained and irrelevant technicalities."

Lack of space prevents any extended notice of the papers read.

The next speaker was the Hon. Thomas W. Martin, Assistant Attorney General of Alabama, who read a carefully prepared, eloquent and convincing paper entitled: "The New Question of State Rights." These papers have been referred to a committee with power to publish, and it is to be hoped for the benefit of the profession that this paper will be put in accessible form. Mr. Martin cited many instances in Alabama where the Federal courts had taken jurisdiction in trust cases and enjoined every state, city and township officer from interfering with the operation of railway monopolies. He said in discussing the Young case, that he believed that a suit against a state officer in the performance of the duties of his office was in essence a suit against the state prohibited by the 11th amendment and concluded as follows: "Congress, in my judgment, can exercise no power by virtue of any supposed sovereignty in the general government. Indeed, there is no such thing as a power of inherent sovereignty in the government of the United States. It is a government of delegated powers supreme within its prescribed power but powerless outside. By the express words of the constitution sovereignty resides in the people and congress can exercise no power which they have not by their constitution intrusted to it, all else is withheld. Wherever practicable, congress should provide remedies for our National evils, but let them be added to, not substituted for, state remedies."

One of the most interesting papers read and one that elicited much applause and enthusiasm was by the Hon. Charles West, Attorney General of Oklahoma, entitled, "Experiments in Government." It was a discussion of the Constitution of Oklahoma and an exceedingly able argument in defense of that instrument. He first attempted to disabuse the minds of his

hearers of the idea that the instrument as a whole was experimental and pointed out on the contrary that it was a collection of doctrines and principles, not new, but which had been tried either in other of our commonwealths or in other Caucasian Republics and had been found to be just what was required to meet present conditions. He showed how the corporations under that law could no longer take refuge behind the contributory negligence provisions. He alluded to the anti-trust provisions wherein the constitution provides as a penalty for its violation, a term in the penitentiary for from ten days to ten years, and that the supreme court may confiscate the personal property of a corporation that is being used, or is about to be used, in violation of the law. He told also of the operation of the Guarantee Banking Law and called attention to the fact that four of the National banks had surrendered their charters and organized as State banks in order to keep and add to their deposits. This paper was discussed elaborately by the representatives present. Senator Owens, of Oklahoma, in the discussion, said in part: "Before the Constitution was written, when the Constitutional convention assembled, the first act of that Constitutional convention was to drive out of Guthrie the lobby of special interests. They had before them every Constitution of every state in the Union and the Republics of the world. They had those constitutions annotated, so that they had at their finger tips the wisdom and the experience of the world, and I have no hesitation in saying that they have written for the world the best constitution which ever has been written by the hand of man. And throughout that constitution there has been one great wonderful idea running. There has been what I have sometimes called a fourth constitutional right. Our Declaration of Independence and our original Constitution of the United States have enlarged upon the right, the inalienable right of life, liberty and the pursuit of happiness. We have added one more,—the right to the peaceful enjoyment of the proceeds of our labor. That is the great issue to-day in the United States—an issue to which the people of the United States of both great parties are responding and which they will properly, safely and sanely solve. They will solve it, and when they shall have found a solution they will have decreed that no private property is superior to a living soul, and that no private property has the right to exercise a domination over other men and make slaves of those who have white skins and white hearts in this country. Whenever you establish a monopoly in this country over a necessity of life, you establish a mastery on one side and its necessary corollary on the other, and that necessary corollary, is slavery. I know full well that there is a multitude of men who, in the abounding providence of God, and who out of the multitude of riches due to modern invention and to modern intelligence and to modern transportation, necessarily live well; but I also know that there are millions of submerged human beings who suffer the pangs of poverty, and suffer what is far worse—physical and spiritual degradation; and the conscience and the intelligence of this land will free that submerged class, and one of the great means by which they will find an avenue to that freedom will be the glorious organic law of Oklahoma."

There were other able papers, one by Hon. W. T. Thompson, Attorney General of Nebraska, on "Experiments in Government"; by Hon.

Frank S. Jackson, Attorney General of Kansas, on "State Regulation of the Liquor Traffic"; by Hon. S. W. Clark, Attorney General of South Dakota, on "The Duties of Attorney General," and by the Hon. R. V. Fletcher, Attorney General of Mississippi, on "The 14th Amendment," discussed by the Hon. U. S. Webb, Attorney General of California, which cannot at this time be commented upon in detail.

In the discussion of the 14th Amendment, General Fletcher demonstrated to the satisfaction of his audience that the amendment was passed in violation of the organic law; that its passage lacked two essential prerequisites—a two-thirds vote of both houses of congress and ratification by three-fourths of the states. That subsequent events have plainly shown that it is futile to expect the amendment to accomplish the results for which it was enacted. That the overzeal of the fanatics at the time of its passage intensified, if it did not create, the race question which is the greatest menace to our civilization. This paper, by universal acclaim, was voted to be a classic and largely owing to its excellence, its author was elected president of the association in place of Attorney General Hadley, who retires to become a candidate for governor of the great State of Missouri.

The Hon. W. H. Dickson, Attorney General of Colorado, was re-elected secretary and treasurer. He entertained the visiting members on Thursday afternoon by an automobile ride to view the beauties of Denver and on Friday evening they were banqueted by the Denver Bar Association at the White City, where there was a genuine feast of reason and flow of soul, et cetera, at which Attorney General Dickson ably presided as toastmaster.

GEORGE D. TALBOT.

Denver, Colo.

CORRESPONDENCE.

LIABILITY OF MEMBERSHIP IN AN ASSESSMENT ASSOCIATION.

Editor of the Central Law Journal:

In the leading case in the issue of your journal, beginning at the end of first column of page 71, current volume, the court says: "The contract is unilateral. The association could not go into court and sue Hahn for his April and May assessments. He was under no legal obligations to pay them, and no legal remedy is open to the order for their enforcement."

From reading the case, I believe that the court overstepped the rule. It seems to me that this is a better statement of the law:

"If the contract of membership does not expressly state that the member shall pay dues and assessments it is unilateral, and a member may decline to pay at his option. The only effect of his failure is to relieve the fraternity from all obligations to him.

"When a member in his contract of membership agrees to pay certain assessments he is liable therefor during the time that he continues to be a member; or in other words, until he withdraws or is expelled from the fraternity in due manner, and any unpaid dues or assessments may be collected with interest from the time that they became due."

Scanlan's Law of Fraternities, secs. 134, and 135. Citing 49 Central Law Journal, 305. Clark v. Lehman, 65 Ill. App. 238. McDonald v. Los Lewin, 29 Hun. 97.

The contract consists of the charter, the by-laws, the benefit certificate and the application for membership. Scanlan's Law of Fraternities. 67.

Milwaukee, Wis. C. M. S.

HUMOR OF THE LAW.

Two Irishmen meeting one day, were discussing local news.

"Do you know Jim Skelly?" asked Pat.

"Faith," said Mike, "an' I do."

"Well," said Pat, "he has had his appendix taken away from him."

"Ye don't say so?" said Mike. "Well, it serves him right. He should have had it in his wife's name."

In a court of justice one woman was suing another for slander. When the plaintiff was put in the witness box her counsel said to her: "Now, madam, just tell the court what the defendant, said about you."

"Oh, I cannot," she hesitatingly replied.

"But, madam, you must," the counsel insisted. "The whole case hangs upon your testimony."

"But it isn't fit for any decent person to hear," replied the witness.

"Ah, in that case," answered the counsel, "just step up to the judge and whisper it in his ear."

The magistrate looked severely at the small, red faced man who had been summoned before him, and who returned his gaze without flinching.

"So you kicked your landlord down-stairs?" said the magistrate. "Did you imagine that was within the rights of a tenant?"

"I'll bring my lease in and show it to you," said the little man, growing still redder, "and I'll wager you'll agree with me that anything they've forgotten to prohibit in that lease I had a right to do the very first good chance I got."

WEEKLY DIGEST.

Weekly Digest of ALL Current Opinions of ALL the State and Territorial Courts of Last Resort, and of all the Federal Courts.

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1. **Abandonment**—What Constitutes.—Abandonment is the relinquishment or surrender of a right or property by one person to another, and includes both the intention and the external act by which the intention is carried out.—*Phillips v. Hamilton, Wyo.*, 95 Pac. Rep. 846.

2. **Adverse Possession**—Abandonment After Acquisition of Title.—A person vested with a good prescriptive title held not divested of title because of abandonment, while he continues to perform acts in relation to the land and title thereto inconsistent with abandonment.—*Dyson v. Knight, Ga.*, 61 S. E. Rep. 468.

3.—**Nature of Title Acquired**.—The plea of adverse possession presented as a defense to an action to recover real estate held not based alone on lapse of time, but an assertion of title in defendant, which may be the basis of affirmative relief against any claimant of the law.—*Meade v. Logan, Tex.*, 110 S. W. Rep. 188.

4. **Agriculture**—Lien on Crops.—In a suit to foreclose a lien on crops for fertilizer, that the fertilizer injured the crops, without reference to failure to comply with the guaranteed analysis required by statute, held not a good defense where purchaser signed an agreement relieving vendors of liability for effects of the fertilizer upon the crops.—*Braxton v. Liddon, Fla.*, 46 So. Rep. 324.

5. **Appeal and Error**—Assignment of Error.—Where an assignment of error is grouped and presented with other assignments to which it is not germane, none of such assignments are required to be considered.—*Wilkins v. Clawson, Tex.*, 110 S. W. Rep. 103.

6.—**Bill of Exceptions**.—Where counsel do not consider errors assigned of sufficient importance to point out in their brief the pages in the bill of exceptions, may be found, the court will not search the record and discuss them.—*Chicago Great Western Ry. Co. v. Egan, U. S. C. C. of App.*, Eighth Circuit, 159 Fed. Rep. 40.

7.—**Failure to Set out Points and Arguments**.—An assignment of error to the denial of a new trial will be treated as abandoned, where plaintiff in error simply states in his brief that the motion should have been granted.—*McCall v. State, Fla.*, 46 So. Rep. 321.

8.—**Judgment**.—Where judgment was rendered for defendant as of nonsuit, and defendant appealed, praying to have the judgment made absolute, and plaintiff prayed for no alteration of the judgment, it will be changed to an absolute judgment in defendant's favor.—*Mallie v. Illinois Cent. R. Co., La.*, 46 So. Rep. 355.

9. **Appearance**—Service by Publication.—Appearance to the merits by defendants, served by publication only, after removal of the suit to the federal courts, held to convert the suit from a proceeding in rem to one in personam.—*Beamer v. Werner, U. S. C. C. of App.*, Seventh Circuit, 159 Fed. Rep. 99.

10. **Assault and Battery**—Willfully Shooting at Another.—On a trial for willfully shooting at another, a charge that the marksmanship of defendant was not pertinent to the issue was not ground for reversal so long as the shooting was intentional and was within range.—*State v. Anderson, La.*, 46 So. Rep. 357.

11. **Bankruptcy**—Allowance of Attorney's Fees.—Where a receiver for a bankrupt, under an order allowing the employment of counsel, employed attorneys for the petitioning creditors, an order on the dismissal of the bankruptcy proceedings refusing to make an allowance out of the fund for the services of such attorneys to the receiver, was proper.—*In re T. E. Hill Co., U. S. C. C. of App., Seventh Circuit*, 159 Fed. Rep. 73.

17.—**Assets**.—Mere nonaction by the trustee of a bankrupt firm with reference to the collection of a judgment in favor of the firm while the same was uncollectible and until after the settlement of the estate held not to constitute an abandonment of the claim to the bankrupts.—*In re Wiseman & Wallace, U. S. D. C., E. D. Pa.*, 159 Fed. Rep. 236.

13.—**Discharge**.—Specifications of objection to a bankrupt's discharge should be verified by the objecting creditors, and not by his counsel, unless some reason is given why the oath is not taken by the creditor.—*In re Randall, U. S. D. C., E. D. Pa.*, 159 Fed. Rep. 298.

14.—**Findings**.—The District Court held not bound by a referee's conclusions of fact because the witnesses testified before him.—*In re People's Department Store Co., U. S. D. C., W. D. N. Y.*, 159 Fed. Rep. 286.

15.—**Involuntary Proceedings**.—To sustain proceedings in involuntary bankruptcy against one as a partner, a partnership in fact must be shown.—*Buffalo Milling Co. v. Lewisburg Dairy Co., U. S. D. C., E. D. N. Y.*, 159 Fed. Rep. 319.

16.—**Insane Persons**.—Where an inquisition found that an alleged bankrupt was insane prior to the date of the alleged acts of bankruptcy but had lucid intervals, the burden of proof was on petitioning creditors to show that such acts of bankruptcy were committed during a lucid interval; the presumption being to the contrary.—*In re Kehler, U. S. C. C. of App., Second Circuit*, 159 Fed. Rep. 55.

17.—**Liens**.—Where a landlord's distress warrant, issued under 2 Purdon's Dig. Pa., 13th Ed., p. 2174 et seq., was levied on the goods of an assignee of the lease within four months prior to the latter's adjudication in bankruptcy, the distress proceeding, though in form against the lessees, was in fact against the bankrupts, and the lien was thereby discharged.—*In re West Side Paper Co., U. S. D. C., E. D. Penn.*, 159 Fed. Rep. 241.

18.—**Preferences**.—A referee in bankruptcy held to have properly refused to postpone the vote for trustee pending determination of the question of preference, where the determination of such question would require an examination of transactions extending over many months, if not several years.—*In re Milne, Turnbull & Co., U. S. D. C., S. D. N. Y.*, 159 Fed. Rep. 280.

19.—**Preferences**.—A suit by the trustees of a bankrupt to recover the value of household furniture alleged to have been transferred by the bankrupt to defendant as a fraudulent preference, in which no equitable relief was demanded, held not maintainable in equity against defendant's objection in limiting that

plaintiffs had an adequate remedy at law.—*Warmath v. O'Daniel, U. S. C. C. of App., Sixth Circuit*, 159 Fed. Rep. 87.

20.—**Preferred Claims**.—A claim against a bankrupt's estate for taxes due the United States held entitled to priority over trustee's commissions and reasonable charges of the trustee's attorney.—*In re Weiss, U. S. D. C.*, 159 Fed. Rep. 295.

21.—**Procedure**.—A finding of a referee in bankruptcy, based on conflicting evidence, that no partnership existed between the persons alleged to constitute a bankrupt firm, would not be reversed on certificate to the district judge, where the referee was not clearly wrong.—*In re Littman, U. S. D. C., E. D. Pa.*, 159 Fed. Rep. 233.

22.—**Rulings on Evidence**.—A referee in bankruptcy should decide questions concerning the competency of witnesses and the admissibility of evidence in the first instance, and only refer them to the court when requested to do so in a proper manner.—*In re Ruos, U. S. D. C., E. D. Pa.*, 159 Fed. Rep. 252.

23.—**Tracing Funds**.—Where money of an association deposited with a bankrupt never came into hands of the bankrupt's trustee, the association's assignee was not entitled to a preference for such balance over the bankrupt's general creditors.—*In re Smith, Thorndyke & Brown Co., U. S. D. C., E. D. Wis.*, 159 Fed. Rep. 268.

24. **Banks and Banking**—**National Banks Liquidation**.—Minority stockholders of a national bank held entitled to maintain an action against the liquidating committee of the bank proceeding to liquidate the same pursuant to the vote of two-thirds of the stock thereof on the committee failing to properly dispose of the assets of the bank.—*Green v. Bennett, Tex.*, 110 S. W. Rep. 108.

25. **Bills and Notes**—**Bona Fide Holders**.—Where assistant cashier while in the management of the bank, in the absence of the cashier from the state, transferred to a second bank a negotiable draft, held, that the second bank obtained sufficient title to maintain an action on the draft.—*Forbes v. First Nat. Bank, Okl.*, 95 Pac. Rep. 785.

26.—**Bona Fide Holders**.—One may be a bona fide holder of commercial paper, though he knew of circumstances that might excite suspicion in the mind of a cautious person, or though he were grossly negligent at the time of the transfer.—*Reilly v. McKinnon, U. S. C. C. of App., Third Circuit*, 159 Fed. Rep. 78.

27.—**Bona Fide Purchasers**.—Where a purchaser of notes for value before maturity, before purchasing, has knowledge that the maker denied liability and of circumstances indicating fraud, he is not a bona fide purchaser.—*Jones v. Jackson, Ark.*, 110 S. W. Rep. 215.

28.—**Failure of Consideration**.—Where the payee of a note given for patent right territory stipulated that he would furnish experienced men to canvass for the maker, a total breach of the stipulation is a good defense to a suit by a holder of the note, who bought it with notice.—*Wilson v. Carter, Ga.*, 61 S. E. Rep. 494.

29. **Carriers**—**Authority of Station Agent**.—A local station agent of a railroad company has ostensible authority to contract to furnish cars for a shipment of cattle to a destination beyond the railroad's line, and, where a shipper has no notice to the contrary and relies upon the appearance of authority, the contract made

with the agent is binding on the company.—*San Antonio & A. P. Ry. Co. v. Timon, Tex.*, 110 S. W. Rep. 82.

30.—**Carriage of Goods.**—The mere fact that a shipper knew that his fruit was shipped in an unsuitable car does not relieve the carrier from its liability for failure to furnish a suitable car.—*F. D. Forester & Co. v. Southern Ry. Co.*, N. C., 61 S. E. Rep. 524.

31.—**Negligence.**—Deviation by carrier of live stock from the usual route because of a washout and bad condition of tracks will not, in absence of negligence, render the carrier liable for loss caused by flood on such new route.—*Empire State Cattle Co. v. Atchison, T. & S. F. Ry. Co.*, U. S. S. C., 28 Sup. Ct. Rep. 607.

32.—**Constitutional Law—Equal Protection.**—A person indicted for crime committed after the grand jury was impaneled is not denied equal protection of the laws because he cannot object that two of the grand jurors were over the age fixed by Laws N. J. 1876, p. 360, c. 196, under which objections must be made before the jury is sworn.—*Lang v. State of New Jersey*, U. S. S. C., 28 Sup. Ct. Rep. 594.

33.—**Fellow Servant Law.**—Ann. Code 1892, sec. 3559, abrogating the fellow-servant rule in certain instances with reference to injuries to railroad employees, held not in violation of the fourteenth amendment of the federal constitution.—*Mobile, J. & K. C. R. Co. v. Hicks*, Miss., 46 So. Rep. 360.

34.—**Contracts—Action to Enforce.**—An action at law cannot be maintained to charge a defendant with liability because of his assumption of a contract to which he was not a party, and a suit to enforce such liability is cognizable in equity.—*Loose v. Hartford Pulp Plaster Corp.* U. S. S. C. D. Conn., 159 Fed. Rep. 318.

35.—**Agreement Between Stockholders.**—An agreement between two factions of the shareholders of a railroad company that one faction owning one-half of the corporate stock shall have the right indefinitely to name a majority of the directors of the company is against public policy.—*Morel v. Hoge*, Ga., 61 S. E. Rep. 487.

36.—**Agreements for Procuring Government Contracts.**—Agreements for procuring government contracts, where compensation is contingent upon the success of the promisee's efforts, are void as against public policy without reference to the question of whether improper means are contemplated or employed in their execution.—*Russell v. Courier Printing & Publishing Co.*, Colo., 95 Pac. Rep. 936.

37.—**Compensation.**—Though an architect was not entitled to recover on the original contract to furnish plans, yet, if thereafter he furnished further plans for another building to be erected at less cost, he was entitled to a reasonable compensation for such additional plans.—*Kurfass v. Martin*, Mo., 110 S. W. Rep. 32.

38.—**Fraud in Procurement.**—One having capacity and opportunity to read a written contract, and who signs it not under any emergency nor because of any trick, cannot afterward set up fraud in the procurement of his signature.—*Truitt-Silvey Hat Co. v. Callaway & Truitt*, Ga., 61 S. E. Rep. 481.

39.—**Courts—Transitory Actions.**—Where an action is transitory to nature, a right or liability imposed by the statute of another jurisdiction may in proper cases be asserted and enforced in California, but only for the purpose

and upon the terms permitted by the *lex loci*.—*Ryan v. North Alaska Salmon Co.*, Cal., 95 Pac. Rep. 862.

40.—**Criminal Law—Aiding and Abetting.**—A person not falling within the class described in a penal statute may under the common law be charged with aiding and abetting another in the commission of the crime.—*United States v. Williams*, U. S. D. C., 159 Fed. Rep. 310.

41.—**Appealable Orders.**—An order refusing leave to withdraw a plea of guilty is not appealable but may be reviewed on appeal from the judgment.—*People v. Dabner*, Cal., 95 Pac. Rep. 880.

42.—**Criminal Trial—Change of Venue.**—An order changing the venue of a criminal case cannot be attacked by a plea of jurisdiction in the court to which the venue is changed.—*Gibson v. State*, Tex., 110 S. W. Rep. 41.

43.—**Former Jeopardy.**—An acquittal under an indictment charging the larceny of a cow is a bar to a subsequent prosecution for the same larceny in which the animal stolen is described as a steer.—*Burch v. State*, Ga., 61 S. E. Rep. 503.

44.—**Motion for New Trial.**—The overruling of a motion for a new trial, on the ground that the sheriff and his deputies sat by the prosecuting attorney, suggesting questions, will not be reviewed, where there is nothing to sustain the allegation, and a bill of exceptions was not reserved.—*Innocento v. State*, Tex., 110 S. W. Rep. 61.

45.—**Damages—What Law Governs.**—The method of reducing expectant future damages for a tort committed in another state to a present equivalent cash sum should be in accordance with the rule of the forum.—*Georgia, F. & A. Ry. Co. v. Sasser*, Ga., 61 S. E. Rep. 505.

46.—**Descent and Distribution—Involuntary Alienation of Property.**—Though the collateral heirs cannot attack a donation of voluntary alienation of property, such incapacity does not extend to the case of an involuntary alienation, where the property is wrested from de cujus by force or threats.—*Grandchamp v. Billis*, La., 46 So. Rep. 348.

47.—**Easements—Way of Necessity.**—A right of way over another's land held not to exist as a way of necessity where claimant's land is bounded by a road connecting with the county roads.—*Corea v. Higuera*, Cal., 95 Pac. Rep. 882.

48.—**Elections—Contest.**—The burden is on one contesting an election to show that the election was null and void, or that he received a majority of the ballots legally cast.—*Garcia v. Cleary*, Tex., 110 S. W. Rep. 176.

49.—**Electricity—Care Required.**—An electric light company is required to exercise the highest degree of care in the construction and maintenance of its wires in the streets and alleys of a city.—*Brubaker v. Kansas City Electric Light Co.*, Mo., 110 S. W. Rep. 12.

50.—**Equity—Mistake in Court Proceedings.**—Equity will grant relief against misprisons and mistakes in court proceedings, not of a judicial character, and even against judicial mistakes, where the court has been misled as to a fact and has pronounced a judgment which otherwise would not have been given.—*Enger v. Knoblauch*, Mo., 110 S. W. Rep. 16.

51.—**Escape—What Constitutes.**—One is not guilty of escape within Pen. Code 1895, sec 314, who effects his own deliverance from jail when his confinement is no part of a sentence im-

posed by a court.—*Welch v. State, Ga.*, 61 S. E. Rep. 496.

52. **Evidence—Handwriting.**—A witness who denies his signature to an instrument may not, on direct examination, for the purpose of a comparison of his handwriting, write his name twice on a piece of paper in the presence of the jury for the purpose of having the papers used to compare his handwriting.—*Wade v. Galveston, H. & S. A. Ry. Co., Tex.*, 110 S. W. Rep. 84.

53. **Federal Courts—Jurisdiction.**—A federal Circuit Court should not dismiss on its own motion for want of jurisdiction a suit against the dairy and food commissioner of the state on the ground that it was one against the state.—*Scully v. Bird, U. S. S. C.*, 28 Sup. Ct. Rep. 597.

54. **Fire Insurance—Contract of Insurance.**—Where a fire insurance company accepts an application for insurance, held, that it could not avoid the effect of the same on the ground that it is a rule not to accept applications upon the inspection and judgment of its agents.—*Allen v. Phoenix Assur. Co., Idaho*, 95 Pac. Rep. 829.

55. **Forgery—Indictment.**—Where the words, "tenor, purport and effect," were used in an indictment for uttering a forged note, the word "tenor" imported an exact copy, and therefore included the words "purport and effect" which referred to the substance of the instrument only.—*Teague v. State, Ark.*, 110 S. W. Rep. 224.

56. **Frauds, Statute of—Debt of Another.**—An agreement on conveyance of real estate to assume the mortgage debt thereon as a part of the consideration is not held an agreement to answer for the debt of another required to be in writing.—*Van Meter v. Poole, Mo.*, 110 S. W. Rep. 5.

57. **Fraudulent Conveyances—Homestead.**—If property had not been abandoned as a homestead when it was conveyed to the owner's wife, an intent to abandon in the future did not make the conveyance fraudulent as to his creditors.—*Gaar, Scott & Co. v. Burge, Tex.*, 110 S. W. Rep. 181.

58.—**Intent to Defraud.**—While a deed of gift may be void because made with intent to enable the grantor to defraud future creditors to bring a case within that rule the deed must be fraudulent in its inception and made with the specific intent to defraud.—*Schell v. Gamble, Cal.*, 95 Pac. Rep. 870.

59. **Habeas Corpus—Object of Writ.**—The writ of habeas corpus cannot be resorted to to discharge relator on a plea set up in the petition that by indictment he is being prosecuted or subjected to a penalty or forfeiture on account of any transaction concerning which he may have testified or produced evidence.—*Ex parte Patman, Okl.*, 95 Pac. Rep. 622.

60. **Homestead—Abandonment.**—A removal to another state intended as temporary only and accompanied at all times during the absence by an intention to return and reoccupy the homestead will not defeat a homestead right once enjoyed within the state.—*Gaar, Scott & Co. v. Burge, Tex.*, 110 S. W. Rep. 181.

61. **Homicide—Instructions.**—In a prosecution for homicide, where the killing was done voluntarily, and was claimed to have been in self-defense, the court should have used the words "voluntary manslaughter" instead of "manslaughter," in charging on that defense.—*Slone v. Commonwealth, Ky.*, 110 S. W. Rep. 235.

62.—**Manslaughter.**—Where the intent is merely to inflict chastisement, and death results from some peculiarity in decedent's constitution, the killing is manslaughter, while, where death naturally ensues, a conviction of murder in the first degree may be had.—*Rosemond v. State, Ark.*, 110 S. W. Rep. 229.

63.—**Motive.**—Where defendant and C. were both charged with killing C.'s husband, pursuant to a common design, the fact that C. had a motive for the killing would not constitute a defense to defendant.—*Anderson v. State, Tex.*, 110 S. W. Rep. 54.

64. **Husband and Wife—Community Property.**—Where a husband after the death of his wife appropriated community property, the heirs of the wife were entitled in partition to a sufficient amount of the father's interest in the land remaining after his death to recompense him for their interest in the other property.—*Clements v. Maury, Tex.*, 110 S. W. Rep. 185.

65. **Infants—Vested Right of Parent to Child's Labor.**—The parent has no vested right in the labor of his child, and the state has a paramount right to control both his labor and education when it deems it necessary to exercise the right for the general good.—*Starnes v. Albion Mfg. Co., N. C.*, 61 S. E. Rep. 525.

66. **Injunction—Grounds.**—A preliminary injunction may properly be granted, where all that is sought is to restrain defendant from interfering with complainant's business pending final hearing, by threatening its agents or attempting to induce them not to act for complainant.—*The Lloyd Sabauco v. Cubicciotti, U. S. C. C., E. D. Pa.*, 159 Fed. Rep. 191.

67. **Intoxicating Liquors—Storing for Sale.**—An ordinance against storing intoxicating liquors for the purpose of sale held not void for failure to limit to the territorial boundaries of the city.—*La Fitte v. City of Ft. Collins, Colo.*, 95 Pac. Rep. 927.

68. **Judges—Disqualification.**—It is of the utmost importance not only that every person should have a fair and impartial trial, but should have no just grounds of suspicion that he has not had such a trial, and to this end an impartial jury and an unbiased judge are absolutely essential.—*Kentucky Journal Pub. Co. v. Gaines, Ky.*, 110 S. W. Rep. 268.

69. **Judgment—Authority to Enter.**—The power to enter judgment depends solely upon the court having acquired jurisdiction by proper service of process, on defendant or by his appearance, and the failure to enter up a default, like the failure to make a proper return of service of process, in no way affects the court's power to act.—*Lunnun v. Morris, Cal.*, 95 Pac. Rep. 907.

70.—**Clerical Misprison.**—A clerical misprison in a judgment must be shown by the record, and can only be corrected by the record, but where it appears from the record itself that a clerical error has been made, it may be corrected by the record.—*Brashears v. Brashears, Ky.*, 110 S. W. Rep. 303.

71.—**Collateral.**—A proceeding lies in equity within proper limits to restrain the judgment of a court of law which was procured by fraud or given through accident or mistake, and such a proceeding is a direct, and not a collateral attack.—*Engler v. Knoblauch, Mo.*, 110 S. W. Rep. 16.

72.—**Conclusiveness.**—A judicial determination of the issues in one action is a bar to a subsequent one between the same parties, hav-

ing substantially the same issues in view, although the form of the latter and the precise relief sought is different from the former.—*McArthur v. Griffith*, N. C., 61 S. E. Rep. 519.

73.—**Equitable Relief**.—Equity may grant relief against a judgment taken by default on a false return of service of process.—*Abraham v. Miller*, Or., 95 Pac. Rep. 814.

74. **Landlord and Tenant**.—Distress.—Where an assignment of a lease was not accepted by the landlord, the original lessees were properly named as defendants in the distress warrant for failure to pay rent.—*In re West Side Paper Co.*, U. S. D. C., E. D. Pa., 159 Fed. Rep. 241.

75.—**Estoppel of Tenant**.—Before a tenant can dispute the landlord's title he must surrender possession and place the landlord in the same position, so far as possession is concerned as he was in when the relation of landlord and tenant was instituted.—*Wallbrecht v. Blush*, Co. o., 95 Pac. Rep. 927.

76.—**Liens**.—A hotel having been sublet with the owner's consent, and the sublessee, having afterwards surrendered the premises to the owner who occupied them during the last two years of the term, the lessee, who had a junior lien thereon for rent, may insist that the owner foreclose his lien only for the rent actually due, not including rent for the two years during which the owner held the premises.—*Kennedy v. Groves*, Tex., 110 S. W. Rep. 136.

77. **Libel and Slander**.—Privileged Communications.—To be privileged, a publication must be by and to only those who have a right or interest in the subject, and made without malice, in a manner to properly serve the right or interest of the parties.—*Briggs v. Brown*, Fla., 46 So. Rep. 325.

78. **Laws and Logging**.—License to Cut Timber.—Where an instrument purporting to be a license to cut certain timber was under its terms to be void if a certain railroad should not be completed within two years, all other stipulations in the instrument were subordinated and governed by it.—*W. B. Thompson & Co. v. Union Sawmill Co.*, La., 46 So. Rep. 341.

79. **Mandamus**.—Judicial Notice.—To determine the question whether it is sought by mandamus to coerce the performance of an illegal act, the court may take judicial notice of the conditions which are germane and exist as to a co-ordinate branch of the government.—*State v. Schnitger*, Wyo., 95 Pac. Rep. 698.

80. **Master and Servant**.—Assumed Risk.—Injured servant held not to have assumed the risk, if he has not been engaged for sufficient length of time in similar duties under similar circumstances, so as to understand the risk and appreciate any defects in the machinery.—*Barrow v. B. R. Lewis Lumber Co.*, Idaho, 95 Pac. Rep. 682.

81.—**Employment of Child Labor**.—The employment of a child in violation of Revisal 1905 sec. 3362, prohibiting the employment of children under 12 years of age, held to be the proximate cause of injuries sustained outside the course of the child's employment and when he was not in discharge of his assigned duties.—*Starnes v. Albion Mfg. Co.*, N. C., 61 S. E. Rep. 525.

82.—**Injuries to Third Persons**.—The negligence of defendant's servant, driving a team suddenly into a street in front of a woman, who fell and was injured in her endeavor to escape, held the proximate cause of the injury, and not the woman's fright, which resulted from

such situation.—*Sandy v. Swift & Co.*, U. S. D. C., E. D. Pa., 159 Fed. Rep. 271.

83.—**Safe Place to Work**.—A ladder maintained by defendant by which plaintiff was expected to reach one of the manheads at the rear of one of the boilers in defendant's creosote plant held a "place" within the rule requiring the master to furnish a reasonably safe place to work.—*Missouri, K. & T. Ry. Co. of Texas v. Steele*, Tex., 110 S. W. Rep. 171.

84.—**Safe Place to Work**.—A railway company must furnish reasonably safe tracks and machinery, and is responsible to its servants for a neglect of this duty by such servants of agents as it may entrust with its performance.—*St. Louis Southwestern Ry. Co. of Texas v. Cleland*, Tex., 110 S. W. Rep. 122.

85. **Mortgages**.—Effect of Unrecorded Deeds.—Possession of land by one who has an unrecorded deed of a definitely described tract, and who resides on the land and cultivates a part thereof, claiming the whole, held sufficient to give notice as to the extent and character of his title.—*Terrell v. McLean*, Ga., 61 S. E. Rep. 485.

86. **Municipal Corporations**.—Contracts.—Where engineers' services under a contract with a city were to be paid for out of the proceeds of an authorized bond issue, it was immaterial to the validity of the contract that the city's general indebtedness already exceeded the charter limit.—*Simons v. City of Eugene*, U. S. C. C., D. Oregon, 159 Fed. Rep. 307.

87.—**Defective Streets**.—A city, in opening a street for travel, held to possess the discretion of determining whether it will prepare the whole width thereof, or only a part, for public travel.—*Herndon v. Salt Lake City*, Utah, 95 Pac. Rep. 646.

88.—**Opening Street for Public Street**.—A city opening and preparing only a part of the street for use, and permitting the remaining part to remain rough, with obstructions on it, held not required as a general rule to mark the limits of the traveled part.—*Herndon v. Salt Lake City*, Utah, 95 Pac. Rep. 646.

89.—**Ordinances**.—An act may be a penal offense under the statutes, and further penalties may be imposed by ordinance where the power to enact the ordinance is vested in the municipality.—*State v. District Court of Second Judicial Dist.*, Mont., 95 Pac. Rep. 841.

90. **Negligence**.—Acts in Emergencies.—Where a person without fault on his part is brought suddenly into a situation of imminent danger, he is not chargeable with culpable negligence because he fails to take the best means of escape, and the party whose negligent act brought him into such perilous situation is not relieved from liability for his injury, if he acts as a person of ordinary prudence might have done under the same circumstances.—*Davis v. Chicago, R. I. & P. Ry. Co.*, U. S. C. C. of App., Eighth Circuit, 159 Fed. Rep. 10.

91. **Nuisance**.—Explosives.—An island in the Detroit river having been used for the storage of dynamite for more than 25 years without complaint, an injunction would only be granted at the suit of complainant, who resided in the vicinity, restraining storage of such quantity as would create danger to complainant or his family or property.—*Henderson v. Sullivan*, U. S. C. C. of App., Sixth Circuit, 159 Fed. Rep. 46.

92. **Parent and Child**.—Right to Custody of Child.—The fact that a father has voluntarily

parted with the custody of his child, and contributed little or nothing to its support, but allowed another to assume his obligations, held to overcome the presumption of his fitness, and require him to establish it before he can be awarded the child's custody again.—*Peese v. Gellerman, Tex.*, 110 S. W. Rep. 196.

93. **Payment—Acceptance of Draft.**—The acceptance of a draft by the owner from a sub-lessee for collection only, and not in discharge of the original lessee's debt, held not to prevent him from foreclosing a lien on the furniture for that amount.—*Kennedy v. Groves, Tex.*, 110 S. W. Rep. 136.

94. **Physicians and Surgeons—Compensation.**—An employer who merely summons a physician to care for an employee, who suddenly became ill, held, in the absence of an express stipulation between employer and employee that the former shall furnish medical aid to the latter, not liable for the services of the physician.—*Norton v. Rourke, Ga.*, 46 So. Rep. 478.

95. **Principal and Agent—Sale of Seat in Cotton Exchange.**—Failure of the superintendent of an exchange to inform the buyer of a seat of the seller's agreement to obtain the requisite notice of intention to sell from the person in whose name the seat stood until after the sale was consummated held not to prevent plaintiff from maintaining an action for breach of such agreement.—*Wolf v. Lovering, U. S. C. C. of App., Second Circuit*, 159 Fed. Rep. 91.

96. **Public Lands—Homestead.**—A homesteader, who initiates a right as to either surveyed or unsurveyed lands and complies with legal regulations, may embrace in his claim land in contiguous quarter sections, if he does not exceed the quantity allowed by law, and makes necessary improvements, and puts the public on notice.—*St. Paul, M. & M. Ry. Co. v. Donohue, U. S. S. C.*, 28 Sup. Ct. Rep. 600.

97. **Quietting Title—Cancellation of Deed.**—A cloud on title of owner of land in Oklahoma under patent in the United States created by record of deed previously executed by him while he was claiming ownership under a Texas patent removed and deed cancelled.—*Bogard v. Sweet, U. S. S. C.*, 28 Sup. Ct. Rep. 595.

98. **Railroads—Use of Railroad Trestle as Foot Path.**—Where a railroad trestle is commonly used by the public as a footpath with the company's acquiescence, the company will be considered as having licensed the public to so use it.—*Texas Midland R. R. v. Byrd, Tex.*, 110 S. W. Rep. 199.

99. **Removal of Causes—Diversity of Citizenship.**—Where plaintiff, a citizen of Nebraska, averred that defendant was a corporation under the laws of New York, and defendant in the petition for removal alleged and in its answer admitted that it was a corporation organized under the laws of New York, the citizenship of the defendant appeared from the pleading.—*Adams Express Co. v. Adams, U. S. C. C. of App., Eighth Circuit*, 159 Fed. Rep. 62.

100. **Schools and School Districts—Dismissal of Teachers.**—The election and dismissal of teachers in the public schools are not "municipal affairs" which may by a freeholders' charter be regulated in a manner in conflict with that provided by the general law.—*Barthel v. Board of Education of City of San Jose, Cal.*, 95 Pac. Rep. 892.

101. **Sheriffs and Constables—Rule Against.**—Where a constable was ruled for failing to

realize and pay over the money due on executions, it is no defense that a lien of higher dignity than the judgments had been foreclosed and the execution on such lien placed with the sheriff.—*Puckett v. State Banking Co., Ga.*, 61 S. E. Rep. 465.

102. **States—Immunity from Suit.**—A suit against the dairy and food commissioner of the state to restrain certain official acts held not a suit against the state forbidden by Const. U. S. Amend. 11.—*Scully v. Bird, U. S. S. C.*, 28 Sup. Ct. Rep. 597.

103. **Legislature.**—A legislature elected under an inequitable apportionment act held not illegal and the court cannot inquire into the qualification or right of any one to a seat therein.—*State v. Schnitger, Wyo.*, 95 Pac. Rep. 698.

104. **Street Railroad—Sale of Franchise.**—An agreement contained in a conveyance of certain franchises to defendant, whereby he agreed to issue bonds to plaintiff in payment of the purchase price, and to build and operate a railroad, held not contrary to public policy.—*O'Sullivan v. Griffith, Cal.*, 95 Pac. Rep. 873.

105. **Subrogation—Rights of Surety.**—A surety on a mortgage bond who paid the deficiency on a sale under the mortgage held thereby subrogated to the rights of his principal under an agreement by a purchaser of the mortgaged premises to assume the mortgage debt.—*Van Meter v. Poole, Mo.*, 110 S. W. Rep. 5.

106. **Taxation—Boundaries.**—Lands between the middle of New York Bay and the low-water line on New Jersey shore are taxable by New Jersey notwithstanding the provisions of compact between the states fixing the boundary line as the middle of New York Bay, approved by Act Cong. June 28, 1834, c. 126, 4 Stat. 708.—*Central R. Co. of New Jersey v. Jersey City, U. S. S. C.*, 28 Sup. Ct. Rep. 592.

107. **Telegraphs and Telephones—Mental Suffering.**—A sendee of a telegram held not entitled to recover for delay in delivery resulting in his mental anguish suffered because of his fear that his mother-in-law and other relatives might catch the yellow fever in a town where they would not have gone had he received the message promptly.—*Rich v. Western Telegraph Co., Tex.*, 110 S. W. Rep. 93.

108. **Trade Marks and Trade Names—Unfair Competition.**—The fact that a manufacturer has modified the dress by which its goods had become known to the public does not justify a rival manufacturer in adopting or simulating the earlier dress, nor relieve it from liability for unfair competition where it has done so.—*De Long Hook & Eye Co. v. Francis Hook & Eye & Fastener Co., U. S. C. C. W. D. N. Y.*, 159 Fed. Rep. 292.

109. **Trial—Express Trusts.**—Where a purchaser of land, in securing a loan, has the title transferred by the vendor directly to the creditor, the conveyance is not only a mortgage, but the grantee also becomes trustee for the purchaser, and the trust is enforceable as soon as the debt is paid.—*Hall v. O'Connell, Ore.*, 95 Pac. Rep. 717.

110. **Wills—Construction.**—A provision in testator's will for the benefit of plaintiff, a person of unsound mind, held to make his right to the possession of the property depend on his actual recovery in fact, and not on the mere making of an order purporting to declare such recovery.—*Aldrich v. Barton, Cal.*, 95 Pac. Rep. 900.

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IS THERE A TWILIGHT ZONE BETWEEN THE NATION AND THE STATE?

By William J. Bryan.*

A number of expressions have been coined to describe the relations existing between the federal government and the several subdivisions, but no one has been more felicitous in definitions than Jefferson or more accurate in drawing lines of demarcation. He declared himself in favor of "the support of the state governments in all their rights, as the most competent administrations for our domestic concerns and the surest bulwarks against anti-republican tendencies," and "the preservation of the general government in its whole constitutional vigor, as the sheet anchor of our safety at home and peace abroad."

It would be almost as difficult to maintain a free, self-governing republic over a large area and with a large population without state governments as it would be to maintain such a republic without a general government. The interests of the different parts of the country are so varied, and the matters requiring legislative attention so numerous, that it would be impossible to have all of the work done at the national capitol. One has only to examine the bills introduced in each Congress, and then add to the number of bills introduced at the legislative sessions of each of the forty-six states, to realize that it would be beyond the power of any body of men to legislate intelligently on the multitude of questions that require consideration.

Not only would national legislators lack the time necessary for investigation, and

*We have requested William H. Taft, the Republican candidate for president for his views on this important question of the relation of state and federal sovereignty. Mr. Bryan promptly sent us this short monograph, which we use as the editorial for this issue.

therefore lack the information necessary to wise decision, but the indifference of representatives in one part of the country to local matters in other parts of the country would invite the abuse of power. Then, too, the seat of government would be so far from the great majority of the voters as to prevent that scrutiny of public conduct which is essential to clean and honest government. The union of the separate states under a federal government offers the only plan that can adapt itself to indefinite extension.

Our constitution expressly reserves to the states and to the people respectively all powers not delegated to the federal government, and only by respecting this division of powers can we hope to keep the government within the reach of the people and responsive to the will of the people. Because in all disputes as to the relative spheres of the nation and the states the final decision rests with the federal courts, the tendency is naturally toward centralization, and greater care is required to preserve the reserved rights of the states than to maintain the authority of the general government.

In recent years another force has been exerting an increasing influence in extending the authority of the central government. I refer to the great corporations. They prefer the federal courts to the state courts, and employ every possible device to drag litigants before United States judges. They also prefer congressional regulation to state regulation, and those interested in large corporations have for years been seeking federal incorporation.

It has been suggested that the rights of the states can lapse through non-use, and that Congress is justified in usurping the authority of the state if the state fails to make proper use of it. While this doctrine has been advanced in the pretended interest of the people, it is as insidious and as dangerous an assault as has ever been made on our constitutional form of government. The people of the state can act with more promptness than the people of the nation, and if they fail to act, it must be assumed that the people of the state prefer inaction.

The predatory corporations have taken

advantage of the dual character of our government and have tried to hide behind state rights when prosecuted in the federal courts and behind the inter-state commerce clause of the constitution when prosecuted in the state courts.

There is no twilight zone between the nation and the state in which the exploiting interests can take refuge from both. There is no neutral ground where, beyond the jurisdiction of either sovereignty, the plunderers of the public can find a safe retreat. As long as a corporation confines its activities to the state in which it was created, it is subject to state regulation only; but as soon as it invades interstate commerce it becomes amenable to federal laws as well as to the laws of the state which created it and the laws of the states in which it does business.

A distinction is drawn between the railroads and other corporations. The railroad being a quasi-public corporation and, as such, being permitted to exercise a part of the sovereignty of the state, is subject to regulation at the hands of both the nation and the state, but this regulation is intended, not to cripple the railroads but to increase their efficiency. The people at large are as much interested as the stockholders are in the successful operation of the railroads. Their own pecuniary interests as well as their sense of justice would restrain them from doing anything that would impair the road or reduce its efficiency. The traveling public is vitally interested in the payment of wages sufficient to command the most intelligent service, for life as well as property is in the hands of those who operate the trains, guard the switches, and keep the track in repair. But we should distinguish between those railroad owners, directors and managers who, recognizing their obligation to the public, earn their salaries by conscientious devotion to the work entrusted to them, and those unscrupulous "Napoleons of Finance" who use railroads as mere pawns in a great gambling game without regard to the rights of employees or to the interests of the patrons. It is in the interest of honest railroading

and legitimate investment that the states are seeking to ascertain the present value of the railroad properties and to prevent for the future the watering of stock and the issue of fictitious capitalization; and it is in the interest of both the railroads and the public that they are seeking such reductions in transportation rates as can be made without wage reduction, without deterioration in the service and without injustice to legitimate investments. We insist that in the matter of regulation of railroads both the state governments and the federal government shall act up to, and yet within, their powers; for nothing else will restore the confidence and good will that ought to exist between the corporations and the people.

NOTES OF IMPORTANT DECISIONS

CARRIERS — VALIDITY OF GENERAL CLAUSE EXEMPTING RAILROADS FROM LIABILITY FOR DESTRUCTION OF BAGGAGE.—It is the general rule that no one can contract against his own negligence. But that does not necessarily mean that a carrier may not put in a general clause exempting itself from all liability for injury to baggage from fire. Such a clause will operate in all cases except as to such injuries occasioned by the carrier's negligence. This was the decision in the case of *French v. Transportation Co.*, 85 N. E. 424, where the Supreme Court of Massachusetts held that the limitation of liability for loss of baggage contained in a passenger's ticket is not invalid, because the limitation is general in its terms, without reference to negligence; but such limitation will be enforced as to all losses not resulting from the negligence of the carrier.

The court said: "By the terms of the contract between the plaintiff and the defendant, the defendant is not to be liable for injury to baggage arising from fire. The legal result of such a contract is that it is not liable for fire unless negligent. *Grace v. Adams*, 100 Mass. 505, 97 Am. Dec. 117, 1 Am. Rep. 131; *School District v. Boston, Hartford & Erie Railroad*, 102 Mass. 553, 3 Am. Rep. 502; *Pemberton Co. v. New York Central Railroad*, 104 Mass. 144, 151; *Hoadley v. Northern Transportation Co.*, 115 Mass. 304, 305, 15 Am. Rep. 106. What was said by this court in *Foneseca v. Cunard Steamship Co.*, 153 Mass. 553, 557, 27 N. E. 665, 12 L. R. A. 340, 25 Am. St. Rep. 660, and in *Cox v. Central*

Vermont Railroad, 170 Mass. 129, 137, 49 N. E. 97, means that such a contract is invalid, if it is construed to be a contract exempting the carrier when he is negligent. It was not meant that where the contract exempts the carrier generally without reference in terms to the subject of negligence, it is invalid altogether. Such a contract is construed to be a contract exempting the carrier unless the passenger proves that he was negligent."

HUSBAND AND WIFE—RIGHT OF HUSBAND TO SUE FOR INJURY TO WIFE OCCURRING BEFORE MARRIAGE AND DURING THEIR ENGAGEMENT.—The syllabus to the recent case of *Mead v. Baum*, 69 Atl. 962, aroused our curiosity. The statement was that no action lies by a husband against a person who has committed a tort upon the woman to whom the plaintiff was engaged to marry at the time of the tort, and whom he subsequently marries.

The question here passed on does not seem to have been passed on by appellate courts with much frequency, as we fail to find any authorities pro or con. The question would admit of no difficulty were it not for the engagement to marry. Facetiously, if not seriously, it might be remarked that if A intentionally injured B's fiancée, he interferes to such extent with B's contract relations. Or, does not B's engagement give him a property interest in his fiancée, which is affected by her injury during the engagement, as well as after the marriage. B would be liable for breach of marriage promise if he broke the engagement. It would seem that where a man solemnly contracts to marry a girl, and her consent closes all avenues to retreat, he should be allowed some recourse against the villain who then proceeds to maim and deface that which has become his by irrevocable contract.

But these observations on our part are purely obiter. The court in the principal case has decided the matter differently, saying: "It is impossible to conceive of any legal principle upon which the action of the husband can be supported. It is true that it is pleaded and proved that at the date of the accident there was a mutual agreement between the plaintiffs to intermarry. But, although the female plaintiff was under contract to marry the male plaintiff, no action by him will lie against the defendant for either preventing the execution of that promise or for causing the promise to be of less value and more burdensome to him. In *Dale et al. v. Grant et al.*, 34 N. J. Law. 142, the plaintiff held a contract by which he was to receive all the articles to be manufactured by a certain corporation. The defendant cut the belts and stopped the machinery of the cor-

poration, and so prevented it from furnishing the articles to the plaintiff according to the contract, to the plaintiff's injury. In delivering the opinion of the Supreme Court, Justice Beasley said: "The principle of law which will sustain such an action is this: That a suit will lie against a wrongdoer who prevents in whole or in part a promisor from fulfilling his contract to the loss of the promisee." The Chief Justice in denying the existence of a right of action in such a situation proceeded to say: "The law does not attempt to give full reparation to all the parties injured by a wrong committed. It is only the proximate injury that the law endeavors to compensate, and the more remote comes under the dead of *damnum absque injuria*." He then cites as illustrative of this rule the case of *Anthony v. Siald*, 11 Metc. (Mass.) 290, where A. agreed with a town for a specific sum to support all the town paupers, and he then brought an action against S. for beating one of the paupers, whereby A. was put to increased expense for the pauper's cure and support. The right of A. to an action against S., who had rendered the execution of the contract more onerous, was denied upon the ground that the damage was too remote and indirect. Other cases were cited in which an insurance company who had contracted to insure the life of a person was not permitted to recover against the defendant who had caused the death of the party insured. The Chief Justice called attention to the fact that the situations which these cases presented were common occurrences, and yet no precedent could be found, where an action was successfully maintained, which in itself was an almost conclusive argument against its maintainability. It seems clear, therefore, that the existence of a promise to marry, and the fact that the injury to the woman rendered the promise of less value to the man, and entailed upon him expense and care, laid no foundation, and presented no reason for an action against the defendant."

PASSING OF STATE AUTONOMY.

The American people are conducting a remarkable experiment in government. They have divided and parcelled out the powers which ordinarily inhere in a single sovereignty, allotting to the federal government those powers which were thought to involve the welfare of all the states, while all others, except such as were expressly prohibited to the states, were reserved to the states respectively, or to the people.

There must arise under any system which attempts it, conflicts of jurisdiction, even when both state and federal government are acting in the most absolute good faith. Yea, more, it is inevitable, while human nature remains as it is, and all power seeks its own aggrandizement, that each jurisdiction, will, as far as permitted, encroach upon the other. Whichever must yield, when its exclusive jurisdiction has been invaded, is not a sovereign, and will not be able to retain the respect of its subjects, nor preserve its rightful authority.

It was not the belief of the founders of the republic that sovereignty itself had been divided. An overwhelming majority of the people of the states believed that in forming the union the states ceded only certain powers, which ordinarily inhere in the sovereign; but that sovereignty itself, the right in the last resort to judge and act for themselves, on their own initiative, for the preservation of their just authority, remained in the states. This belief, acted upon by the people of the south, culminated in the civil war, which resulted in the absolute discrediting of the doctrine, and the complete overthrow of the theory that in the federal system the state was the ultimate sovereign.

The war wrought many radical changes in our system, and has completely shifted its center of gravity. The doctrine of state sovereignty has been definitely, and forever, abandoned, and our system is now confessedly one of divided powers, in which all conflicting pretensions must be arbitrated, determined and finally settled by a court that is itself a part of the federal government, and which is armed with ample power for the enforcement of its decrees. It is difficult to see how, under such a system, the federal government can avoid becoming, if indeed it has not already become, ex-necessitate rei, the ultimate and real sovereign. The states, under the only view of the constitution and of the effect of the union now possible, must hold their reserved powers at the sufferance of the federal government, except as it may be

restrained by the supreme court, which is the only and final arbiter of all controversies of jurisdiction and power. If our system of dual government is to be maintained, it is necessary that the supreme court shall, by its decisions, clearly delimit the frontier between the powers of the federal and state governments, and shall inflexibly and sternly hold the federal government, in all its departments, within the sphere marked out for it by the constitution.

If this be not done, if in all controversies the doubt be resolved in favor of the federal government and against the states, if the national congress be permitted by indirection to accomplish objects not within its jurisdiction, and, under pretense of exercising its conceded powers, to deal with subjects left by the constitution in the exclusive jurisdiction of the states; there will not be left, in the end, any irreducible minimum of power in the states. Each aggression upon state power will lead to other and further invasions; the line of demarcation between the two jurisdictions will be obliterated, and the federal government will usurp all power, for the simple reason that it can.

A state that is stripped of all right to resist encroachment upon its powers, cannot, except with great difficulty, maintain them in any event; and, it would seem, not at all, unless the court which is the final arbiter will hold the scales between the two governments with absolute fairness and impartiality.

The federal system cannot be preserved unless the states are maintained in the full exercise of all the powers reserved to them by the constitution. Without autonomous states there can be no federal union.

If in the further development of our national life the control of internal and local affairs is surrendered by the states, or usurped by the national government, our entire system will prove a disastrous failure. The supreme court in *Northern Securities Co. v. the United States*,¹ quoted

(1) 193 U. S. at page 348.

with approval from *Texas v. White*,² that "the people of each state compose a state, having its own government, and endowed with all the functions essential to separate and independent existence," and that "without the states in union there could be no such political body as the United States," and that "not only therefore can there be no loss of separate and independent autonomy of the states through their union under the constitution; but it may be not unreasonably said that the preservation of the states and the maintenance of their government are as much within the design and care of the constitution as the preservation of the union and the maintenance of the national government;" and added, "these doctrines are at the basis of our constitutional government, and cannot be disregarded with safety."

If this be true, (and who can doubt it?), to uphold and maintain unimpaired all the just rights and powers of the states should be at all times the jealous care and concern of the supreme court; but especially so now, in view of the insistent demand in many quarters that congress in one way or another take over control of matters which were left by the constitution in the exclusive jurisdiction of the states. If the preservation of the powers of the states be as important as the preservation of the powers of the union, then it is of the last degree of importance that the supreme court should apply in the determination of all constitutional questions rules of construction as favorable to state power as to federal.

Has it done this? I maintain that it has not. I go further, and insist that its fundamental rules of construction tend to the gradual whittling away of the reserved powers of the state, and encourage and promote the usurpation by congress through a process gradual, but now rapidly accelerating, of repeated invasion by in-direction of the sphere of state action. The court seems never to approach the consideration of a question of national power with-

out a feeling of awe. Its duty of declaring invalid acts of congress in gross and palpable violation of the constitution it declares to be a painful one. Why it should adopt such an attitude is not apparent to those who know that congress, like every other legislative body acting under a written constitution, will go just as far in violation of the constitution as popular clamor demands and the courts permit. Every act of congress thus becomes a part of the supreme law of the land, and overrides all state law inconsistent with it, unless it plainly and unmistakably violates the constitution. All doubts are resolved in favor of federal power. All doubts are thereby resolved against the reserved powers of the states and the reserved rights of the people; for, in most cases, no act of congress can by any possibility be unconstitutional except as it violates the one or the other. Why this should be deemed a sound rule of construction by a court which acknowledges itself bound by the high and solemn duty of maintaining the reserved powers of the states and people in their original integrity it is difficult to see.

The centripetal is overcoming the centrifugal force, and all power tends now to centralization in the national government. Whether it is possible to maintain the two in a condition of equilibrium is open to grave doubt. If state autonomy and national power are both to be maintained, the court must come to consider both with equal favor, must adopt fair rules of construction, must lose somewhat of its awe of federal power, must read between the lines in congressional legislation, and consider what will be its necessary scope and operation, and must hold void, as in derogation of the powers of the states, all acts which, in their manifest intent and necessary effect, invade the exclusive sphere of state control.

A corollary of the rule of construction that resolves all doubts in favor of national power, is that one which declares that, when a power is conceded to be in congress, the court can place no limit upon its exer-

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cise, cannot inquire into the motive and purpose for which it is invoked, nor do anything to prevent its use as a pretext for the invasion of the sphere marked off for state action, and the accomplishment of objects which the constitution excludes from the sphere of federal control. These propositions are maintained in *McCray v. United States*.³ Congress in that case had used its taxing power to destroy the oleomargarine business. The raising of revenue was the most transparent of pretexts. The regulation, or rather destruction of the business of producing a commodity was the real purpose, undertaken by congress upon the demand of the dairying interests. If the production of commodities, even when designed for interstate commerce, be not internal and local, and its control entirely within the sphere of state action, then nothing can be. The supreme court, speaking through Justice Damar, unanimously so held in *Kidd v. Pearson*.⁴ And yet in *McCray v. United States* the court held that it was powerless to prevent congress by indirection, by abuse of its power of taxation, from invading the exclusive sphere of the state, and accomplishing an object confessedly not entrusted to the federal government.

This seems to be in irreconcilable conflict with the words of Chief Justice Marshall in *McCullough v. Maryland*,⁵ where he declares "that should congress, under pretext of executing its powers, pass laws for the accomplishing of objects not entrusted to the government, it would become the painful duty of this tribunal, should a case requiring such a decision come before it, to say that such an act was not the law of the land." The court in *McCray v. United States* has wandered very far from this salutary principle declared by Chief Justice Marshall.

For the gravest abuses of its powers by congress, wherein it uses an acknowledged power for the invasion of the sphere

reserved exclusively to the states, the supreme court knows no remedy save an appeal to the people. It seems to have abdicated its own constitutional duty to preserve the powers of the states from invasion, and to have abandoned the only means by which written constitutions can be maintained. It has left the rights of minority sections and classes at the mercy of congress. Yet while the court holds itself powerless to protect the states from invasion, by indirection, of their exclusive sphere by the federal government, it finds no difficulty in holding a state law void, if its necessary effect is to usurp a power granted by the constitution to the government of the United States, even though on its face such act be seemingly within the power of the state. Upon this question the court says in *McCray v. United States*,⁶ "of course where a state law states, and on its face such act as seemingly within the power of the state of adopt, but its necessary effect and operation is to usurp a power granted by the constitution to the government of the United States, it must follow, from the paramount nature of the constitution of the United States, that the act is void. In such a case the result of the test of necessary effect is to demonstrate the want of power because of the controlling nature of the limitations imposed by the constitution of the United States on the states." In other words, it may be added, the states may not by indirection usurp the power of the federal government; but the federal government may at its pleasure by indirection usurp the powers of the state government. The latter abuse the court is powerless to prevent; the former it will strike down whenever and however attempted.

There is scarcely a limit that can be placed upon the power for evil of the doctrine elaborated in *McCray v. United States*. Under its authority congress can by a prohibitive tax strike down any industry, of whatever character, in any of

(3) 195 U. S., 43.

(4) 128 U. S., 126.

(5) 4th Wh. 416.

(6) 195 U. S., 60.

the states, even though no part of its product is intended to become a subject of interstate commerce. But it will doubtless be applied more widely in regulation of matters of internal police under pretense of regulating interstate commerce. Congress has already enacted legislation, the pure food and drug act, the sole purpose of which is to improve the quality of food products, drugs and medicine. However wise it may be in policy, it can find no possible justification, as an exercise of any lawful power of congress, unless it be the power to regulate interstate and foreign commerce. I believe it has not as yet been passed upon by the supreme court. But it is indorsed by both the great political parties, is quietly acquiesced in by the entire country, and will doubtless receive the sanction of the courts. And yet it is nothing but an inspection law, which is a matter of internal police, of state control, if anything can be. Said Chief Justice Marshall in *Gibbons v. Ogden*,⁷ "that inspection laws may have a remote and considerable influence upon commerce will not be denied; but that a power to regulate commerce is the source from which the right to pass them is derived cannot be admitted. The object of inspection laws is to improve the quality of articles produced by the labor of the country; to fit them for exportation; or it may be for domestic use. They act upon the subject before it becomes an article of foreign commerce, of commerce among the states, and prepare it for that purpose. They form a portion of that immense mass of legislation which embraces everything within the territory of a state not surrendered to the general government; and which can be most advantageously exercised by the state themselves. Inspection laws, quarantine laws, health laws of every description, as well as laws for regulating the internal commerce of a state, and those which respect turn-pike roads, ferries, etc., are component parts of this mass."

What the future may hold for us, in the

way of invasion by indirection of the exclusive sphere of state control, we can as yet only vaguely conjecture: whatever the supreme court will permit, we may be sure. And the court, having abandoned safe rules of construction, seems unable to find any solid ground upon which to plant a decision upholding the right of the states, and rarely, if ever, renders one without being convicted, by minority members, of hopeless inconsistency with previous decisions. It is highly probable that, in the not distant future, we will have a child labor law, under which child labor will be effectively prohibited under pain of exclusion from interstate commerce of all commodities produced in whole or in part by the labor of children. Later on when congress has become a little more completely dominated by organized labor, we may possibly see all productive industry committed to a labor monopoly under an act forbidding any commodity to be received for shipment across state lines, unless it bears the union labor label.

The power to promote the general welfare, if it be a substantive power, and the words do not import a mere limitation upon the taxing power, is the broadest, vaguest and most dangerous grant of power in the entire constitution. I know it is contended that the words do not at all import the grant of a substantive power, but are a limitation of the taxing power: and we have been told that this was so held in *Jacobson v. Mass.*⁸ I have scanned that case narrowly, and can find no such pronouncement in any copy of the opinion accessible to me. The language of the court with respect to the general welfare clause seems to be restricted to a consideration of rights supposed to be secured by the preamble to the constitution. Says the court "although that preamble indicates the general purpose for which the people ordained and established the constitution it has never been regarded as the source of any substantive power

(7) 9 Wh. 203.

(8) 107 U. S.

conferred on the government of the United States, or any of its departments. Such power embraces only those expressly granted in the body of the constitution, and such as may be implied from those so granted. Although, therefore, one of the declared objects of the constitution was to secure the blessings of liberty to all under the sovereign jurisdiction and authority of the United States, no power can be exerted to that end by the United States, unless, apart from the preamble, it be found in some express delegation of power, or in some power to be properly inferred therefrom."⁸ This is, in no sense, an opinion as to whether the general welfare clause in Art. I, Sec. 8, be a substantive grant of power, or a mere limitation upon the taxing power: and if the court has ever so declared itself upon that question, I have been unable to find the opinion. But the executive and legislative departments of the government construe it, as an independent and substantive grant of power; and the country including every school of constitutional interpretation, seems to acquiesce in that construction.

If it is ever judicially determined that the general welfare clause is a grant of substantive power, it will be almost, if not absolutely, impossible for the supreme court to place any effective check upon congressional invasion of what has always been held to be the exclusive sphere of the states; for there is no other power so incapable of delimitation or so susceptible of abuse; and the time will come when the states will be permitted to legislate upon very many questions, hitherto deemed of exclusive state cognizance, only so far as congress may not care to concern itself with them.

State power is on the wane and state autonomy is passing. The adoption of rules of construction, by the supreme court, which discriminate unfairly against state power, enables congress by indirection to encroach upon it more and more. The

amendments adopted as a result of the war lend themselves to the rapid promotion of the disintegration and overthrow of state autonomy. By them all state legislation is, in effect, subjected to federal censorship, even when dealing with exclusively local affairs. It has become practically impossible now, under recent decisions, for a state legislature to enact a law that can be put into operation until the supreme court has reviewed it, and given its gracious permission. The people themselves are rapidly losing faith in state government, and confidence in its power to redress their wrongs and promote their welfare, and as they lose faith in the efficacy of state law, they turn more and more to congress for all remedial and corrective legislation. All conditions seem to favor the centralization of power at Washington.

The remedy is not to be found in the restraining power of the courts. If the states are not to perish, though the atrophy and decay of their powers, this result must be prevented by rousing public opinion to the danger. The people themselves must be made to realize the absolute necessity of preserving state autonomy unimpaired, so that they will cease to demand of their senators and representatives in congress action that is without constitutional warrant, and will frown upon and condemn every vote in congress which violates the constitution, and infringes upon the reserved rights of the states and the people. Indeed they must go further, and insist upon the legislative department doing everything possible, in the way of legislation, toward freeing the states from the humiliating position, in which they are placed by very recent decisions of the supreme court, of tutelage to the inferior federal tribunals, and of exclusion, by injunction, from resort to their own courts for the enforcement of their own laws. If the people themselves are not aroused to the necessities of the situation, and induced, not only themselves to respect the rights of the states, but also to enforce a like respect upon all the departments and

(8) *Jacobson v. Mass.*, 197 U. S. 21.

agencies of the national government, state autonomy will perish, and with it will pass our system of federal republicanism. In its place we will have imperial power and splendor, and then —despotism.

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*The substance of this article was delivered recently before the Mississippi Bar Association, but the treatment has been revised by Mr. Cox for publication in the Central Law Journal.

THE NEW QUESTION OF STATES' RIGHTS.

The question of this article is suggested by the decision of the Supreme Court of the United States in the case of *Ex Parte Edward T. Young*.¹ That case presents the subject of this paper in a light different from that in which it had been previously understood throughout the country; at any rate, the court went much further in the one great constitutional question there decided than it had ever gone before in any previous case, and I venture the assertion that the passing of a few years will show a gradual receding from the position there taken.

In order to understand the question, I have thought it not amiss to review briefly the history of the amendment and to discuss several of the cases in which it has been involved.

When the federal constitution was on its trial before the American people, the question of whether a state was subject to the suit of an individual, within the meaning of that clause of the constitution defining the judicial power of the United States, was discussed at length in at least two of the states, viz: New York and Virginia. It was contended by Marshall and by Hamilton that no such jurisdiction existed under the common law, and that it was not the intention of the constitution to create new and unheard of remedies. The eighty-first number of the *Federalist*, written by Hamilton, has the following profound remarks: "It is inherent in the nature of sovereignty not to be amenable to the suit of an individual *without its consent*. This is the general sense and the general practice of mankind; and the exemption, as one of the attributes of sovereignty, is now enjoyed by the government of every state in the Union. Unless, therefore, there is a surrender of this immunity in the plan of the convention, it will remain with the states, and the danger intimated must be merely ideal." And this was likewise the view held by Thomas Jefferson, though he differed widely with

Hamilton's theory of a strong central government, and at all times maintained that the powers of the federal government should be strictly construed within the limits fixed by the constitution.

Within three years after the constitution became effective the decision of the supreme court in *Chisholm v. Georgia*,² was announced. It was startling and unexpected "and created such a shock of surprise throughout the country that, at the first meeting of congress thereafter, the eleventh amendment to the constitution was almost unanimously proposed and was in due course adopted by the legislatures of the states." This amendment expressed the will of the ultimate sovereignty of the whole country, a power superior to all legislatures and all courts and actually reversed the decision of the supreme court. Its adoption by congress and the states so soon after the decision in the *Chisholm* case showed the attitude of the political parties of the day. They were led by statesmen and constitutional lawyers as able as any period of our history has developed, and their respective positions were sharply defined.

The attempt to restrict the meaning of the eleventh amendment, in *Osborn v. Bank*,³ to those suits in which the state was a party on the record, was not followed by Chief Justice Marshall in the later case of *Governor of Georgia v. Madrazo*.⁴ In this case the claim was made upon the Governor. He was sued, not by his name, but by his title, and demand for the possession of the slaves and for the moneys realized for those already sold was made upon the Governor officially and not personally. As said by Chief Justice Marshall: "The decree is pronounced not against the person, but the officer * * * In such a case, where the chief magistrate of the state is sued, not by his name, but by his style of office and the claim made upon him is entirely in his official character, we think the state itself may be considered as a party on the record. If the state be not a party, there is no party against whom a decree can be made." In *Davis v. Gray*,⁵ the doubtful doctrine was again enunciated that the fact that a state cannot be made a party to a suit in the United States Court by reason of the eleventh amendment was a sufficient reason for the omission to do it, "and the court may proceed to decree against the officers of the state in all respects as if the state was a party to the record;" and yet in the case of *Governor of Georgia v. Madrazo*, it was distinctly held by Chief Justice Marshall that a decree could not be rendered against the Governor of the state in his character as such. It is difficult, if not wholly impossible, to reconcile the

(1) Decided March 23, 1908.

(2) 2 Dall. 419 (1792).

(3) 9 Wheat. 738.

(4) 1 Pet. 110.

(5) 16 Wallace 203.

doctrine of these cases. The case of *Hans v. Louisiana*,⁶ contains an interesting discussion of the question, and the court in effect held in a well considered opinion by Mr. Justice Bradley, that the decision in *Chisholm v. Georgia* was wrong.

One of the most notable of the cases supporting the doctrine of *Governor of Georgia v. Madrazo* is *Re Ayers*,⁷ which, in my judgment, is right, and should to-day be the law of the land. Without a discussion of that case in detail, it may be sufficient to quote in part the language of the court: "The acts sought to be restrained are the bringing of suits by the State of Virginia in its own name and for its own use If a decree could have been rendered enjoining the state from bringing suit against its tax payers, it would have operated upon the state only through the officers who by law were required to represent it in bringing suits, viz: the present defendants, its attorney general and the commonwealth's attorneys for the several counties." The opinion of the court in that case rendered by Mr. Justice Matthews is full, elaborate and to the point. Its reasoning is sound and in exact accord with the true meaning of the eleventh amendment. The Supreme Court in the *Young* case disposes of the *Ayers* case in a half dozen lines without really considering it, or giving to the opinion the effect to which it is entitled.

The case of *Fitts v. McGehee*,⁸ stands out conspicuously in the line of cases on this subject. It also represents the true construction of this amendment, and was decided at a time and under conditions which did not exist in the later cases when railroads had so frequently brought into question state enactments, on the theory that such statutes violated their constitutional rights. Mr. Justice Peckham in the *Young* case, devotes probably more time and space to a discussion of the *Fitts* case than to any other adjudication of that court. I shall later refer to this case, applying its doctrine to the pending Alabama cases.

It is not necessary for us to go out of the record in pointing to the peculiar conditions that surrounded the *Young* case. No less a personage than a member of that court, and I refer to Mr. Justice Harlan, has a statement on this question which is highly interesting. Referring to the apprehensions held by counsel for the railroad companies, that by reason of the heavy and successive penalties their property would be destroyed, that learned writer said: "I infer from some language in the court's opinion that these apprehensions are shared by some of my brethren. And this supposed danger to the railroad companies and its shareholders seem to have been the basis of the action of the federal circuit court when by its order directed against the

Attorney General of Minnesota, it practically excluded the state from its own courts in respect of the issues involved." Was this same supposed danger the basis of the action of the majority of the supreme court? The question of the validity of the penalty feature of the statutes was not, and could not rightly be involved in the determination of that case. Whether the suit was one against the state should have been determined upon the record as the parties had made it and it was not necessary to go out of the way, as suggested by Mr. Justice Harlan, in order to consider that feature of the law.

If full scope is given the opinion in the *Young* case it will follow that the federal court may prevent the state from being represented in its own courts by its chief law officer upon issues involving the constitutional validity of state enactments—and it would seem that the character and purpose of those enactments will be immaterial. In view of the fact that this mode of redress is absolutely forbidden by the eleventh amendment, can it "be made legal by mere construction or by the consideration of the consequences that may follow from the operation of the statute? The country should never be allowed to think that the constitution can, in any case, be evaded or amended by mere judicial interpretation, or that its behests may be nullified by an ingenious construction of its provisions."

And moreover the state is placed in a condition not dreamed of when the constitution was adopted or the eleventh amendment proposed. It was never within the contemplation of Hamilton, or of the most ardent exponent of his teachings, that an inferior federal court would, or could enjoin or suspend the operation of state laws; nor when the fourteenth amendment was proposed to and adopted by the states did it occur to anyone that therein and thereby secretly lurked a condition which in the present day would give jurisdiction to the federal courts of suits against the state, and yet the jurisdiction which is exercised is drawn arguendo from that amendment and an attempt to save it from violation by the states.

But it is said that when the state assumes to regulate its common carriers, a proceeding to enforce a statute with that end in view does not affect the state in its sovereign or governmental capacity, and that the officer who thus attempts to enforce such statutes which are *alleged* to be unconstitutional is "stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct." Thomas Jefferson expressed the view "that all acts done by those agents under the authority of the nation are the acts of the nation, are obligatory upon them and enure to their use." And in the Kentucky resolutions written by Jefferson in 1798, he held that the constitution and

(6) 134 U. S. 1.

(7) 123 U. S. 123.

(8) 172 U. S. 516.

its amendments delegated to the general "government certain definite powers, reserving, each state to itself, the residuary mass of right to their own self-government." Moreover, every state in the Union, in every instance where its sovereignty has not been delegated to the United States, is as completely sovereign as the United States are in respect to the powers surrendered. The United States are sovereign as to all the powers of government actually surrendered, and each state in the Union is sovereign as to all the powers reserved to them by the constitution. It has been pointed out by a learned writer that "a state does not owe its origin to the government of the United States, in the highest or in any of its branches. It was in existence before it. It derives its authority from the same pure and sacred source as itself, the voluntary and deliberate choice of the people." And the state being first in existence, the United States have no claim to any authority but such as the states surrendered to them. When the state by its duly constituted officers proceeds in its own tribunal to enforce its laws, surely such action by the state in the exercise of its sovereignty and any attempt to interfere with its exercise would certainly appear to affect the state in its sovereign capacity.

As the law stands to-day, it may well be asked what in fact does constitute a suit against the state? While the *Fitts* case is not overruled, the fears of Mr. Justice Harlan that it has been "frittered away or put out of sight by unwarranted distinctions," challenges the most thoughtful and serious consideration, and together with the case of *Haygood v. Southern and Re Ayers*, occupies a unique position among the decisions of the supreme court. While not overruled, but in fact referred to and recognized by the court, they yet seem to be without convincing force, and are totally eclipsed by the later cases.

The theory was at first advanced and maintained in the opinion of the court in the *Fitts* case that unless the state officers were specially charged with some duty with reference to the statutes in question, there was no authority in the court to sustain federal jurisdiction. In the later cases, and particularly in the *Young* case, the court seems to have gotten away from that theory and the proposition is now stated to be that the fact that the state officer, by virtue of his office, has some connection with the enforcement of the act is the important and material fact, and whether it arises out of the general law or is specially created by the act itself, is not material so long as it exists.

In connection with the theory of "special charging," it now seems to be a necessary element of jurisdiction that there must also have been an intention on the part of the officer-defendant to commit a wrong or trespass upon the property of the complainant; and a threatened suit was in the *Young* case in effect held to be such a

trespass as would lay the defendant liable to an injunction from the federal court.

Adverting to the contest now being waged in Alabama between the railroad companies and the state, counsel for the state are confident of ultimately sustaining the statutes in question, notwithstanding the able and elaborate opinion rendered by Judge Jones in which he decides practically every question against the state. Twelve of these cases were originally instituted in the United States Circuit Court at Montgomery. Later, by compromise and adjustment, seven of the complaining railroads accepted the terms of the rate statutes and dismissed their bills, leaving five of the original suits now pending. In addition the Central Trust Co., of New York, the trustee in a deed of trust from the Central of Georgia Railroad Company, later filed a bill against that company in which the Railroad Commission of Alabama and the sheriffs, solicitors and clerks of the counties in which the company operates were also made defendants. Two of the original complaining companies amended their bills by making sheriffs, solicitors and clerks of the counties through which they operate, parties defendant. Five cases are now involved in this litigation. While originally the railroad commission and the attorney general were charged with special duties in and about the enforcement of these laws, such duties were divested by the act of the extra session of the Alabama legislature in November, 1907, so that there exists to-day no authority in Alabama on the part of any officer to proceed to an enforcement of these statutes in question; and they were left to be enforced by the solicitors of the various inferior courts through indictments by the grand juries. But the solicitors were enjoined from instituting, prosecuting or aiding in prosecuting any proceeding, civil or criminal, of any kind or description against the complainant; the clerks were enjoined from filing any indictment, summons or other process in which any of such acts were brought into question and from issuing any process thereon; and the sheriffs were enjoined from executing or serving any summons or other process in any civil or criminal suit and from in any manner interfering with the complainant, its officers, or agents on account of the violation of any of the acts of the legislature brought into question; and further, from restraining any such officers or agents in the jails of any of the counties of the state or elsewhere under any warrant, indictment or otherwise on account of such violations.

In the *Fitts* case, the Alabama legislature fixed the tolls to be charged for crossing a bridge. The penalties for disobeying that act by demanding and receiving higher tolls, were to be collected by the persons paying them. No officer of the state had any official connection with the recovery of such penalties. Certain indictments were

found under another statute, against the officers of the company, for violating the act, and it was sought to enjoin the trial of such indictments. The state was originally made a party defendant *eo nomine*, but the suit was dismissed as to the state and proceeded against the attorney general, the solicitors of the circuit in which the indictments were pending and an individual who had threatened to maintain a penalty suit. After reviewing the case Judge Harlan said: "If these principles be applied in the present case, there is no escape from the conclusion that, although the State of Alabama was dismissed as a party defendant, this suit against its officers is really one against the state. As a state can act only by its officers an order restraining these officers from taking any steps, by means of judicial proceedings, in execution of the statute of Feb. 9, 1895, is one which restrains the state itself, and the suit is consequently as much against the state as if the state were named as a party defendant on the record." Can the conclusion be escaped, that the Alabama suits are really against the state? An affirmative answer is inevitable, for to my mind they seem fairly and squarely to come within the long accepted definition of a suit against the state.

It would seem that under the exception recognized in the Young case the Alabama suits must also be held to be against the state. The declaration by the court is pertinent here: "It is proper to add that the right to enjoin an individual, even though a state officer, from commencing suits under circumstances already stated, does not include the power to restrain a court from acting in any case brought before it, whether of a civil or criminal nature, nor does it include the power to prevent any investigation or action by a grand jury. The latter body is part of the machinery of a criminal court, and an injunction against the state court would be a violation of the whole scheme of our government." With the hands of its solicitors tied by injunction, its clerks prohibited from filing the indictment and from issuing process thereon, its sheriffs enjoined from serving any process, we have the very condition which the court says is "a violation of the whole scheme of our government." There could be no more effective restraint of the grand jury. If an indictment should be preferred by the grand jury, the clerk could not even file it without being guilty of a contempt of the federal court, and thus the indictment would remain with the body with which it originated.

I cannot permit this opportunity to pass without expressing my unyielding opposition to the effort of recent years to extend the constitution by judicial construction. Mr. Root's speech before the Pennsylvania Society in 1906, caused much discussion by his prediction of a greater centralized rule through the concentration of

power in the federal government, and shortly afterwards the President referred with some impatience to the "curious revival of states rights."

Mr. Root insisted that there was "but one way in which the states of the Union can maintain their power and authority under the conditions which are now before us, and that was by an awakening on the part of the states to a realization of their own duties to the country at large," and that "it is useless for the advocates of states' rights to inveigh against the supremacy of the constitutional laws of the United States, or against the extension of national authority in the fields of necessary control where the states themselves fail in the performance of their duty."

With due respect to the great ability of Mr. Root, I say that this doctrine is to my mind, a most dangerous one. It not only destroys but actually reverses the principle that the federal government is founded upon a grant of powers, and that all powers not granted are reserved to the states.

Congress, in my judgment, can exercise no power by virtue of any supposed inherent sovereignty in the general government. Indeed, there is no such thing as a power of inherent sovereignty in the government of the United States. It is a government of delegated powers, supreme within its prescribed sphere, but powerless outside of it. By the express words of the constitution, sovereignty resides in the people, and Congress can exercise no power which they have not by their constitution, intrusted to it; all else is withheld.

If the power in question is not in terms granted and is not necessary and proper for the exercise of a power which is thus granted, it does not exist. And in determining what measures may be adopted in executing the powers granted, Chief Justice Marshall declared that they "must be appropriate, plainly adapted to the end, not prohibited and consistent with the letter and spirit of the constitution."

Wherever practicable the congress should provide federal remedies for our national evils, but let them be added to, not substituted for state remedies. I cannot believe that this doctrine of the "twilight zone" as it has been popularly dubbed, will receive recognition from the American people, nor from that final arbiter of national questions, the supreme court.

THOMAS W. MARTIN.

Montgomery, Ala.

DAMAGES — RELATIONSHIP AND "MENTAL ANGUISH."**JOHNSON v. WESTERN UNION TELEGRAPH CO.**

Supreme Court of South Carolina, Sept. 2, 1908.

While mental anguish or suffering will be presumed in case of a telegraph company's failure to deliver a death message, by which the addressee is deprived of receiving or bestowing the ministrations of husband or wife, father, mother, brother, sister, grandparent, and grandchild, and is deprived of attending their funeral rites, no such presumption obtains in the case of more distant relatives, such as uncle, aunt, niece, nephew, and cousin, with reference to whom it must affirmatively appear from the evidence that special relations of tenderness and affection existed between them and deceased of which the telegraph company had notice, in order to entitle them to recover for mental anguish.

WOODS, J.: The following telegram, intended for the plaintiff was delivered to the defendant's agent on 3d of August, 1906, at Hudson, N. C.: "Miss Mary Johnson, near Sou. Dept., Chester, S. C. Allie dead. Bring here to-morrow. Answer whether you can come. S. J. Smith." Allie was the wife of the sender and the first cousin of the plaintiff. The telegram was not delivered till August 6th, and negligence on the part of the agent at Chester in not making proper efforts to find the addressee was admitted. The plaintiff recovered judgment for \$150 for mental anguish and suffering in being deprived of the privilege of attending the funeral of which the telegram was intended to give notice.

The single question made by the appeal arises from the refusal of the circuit judge to charge the following requests: "This court charges that where a party is deprived of attending a funeral by reason of delay in the delivery of the telegram, and the relationship between such party and the deceased to whom the telegram relates is that of first cousin, proof of such relationship is not of itself sufficient to raise a presumption of mental anguish, and, in order to enable such party to recover damages for mental anguish on account of such deprivation, it must affirmatively appear from the evidence that special relations of tenderness and affection existed between the plaintiff and the deceased, and that at the time the message was accepted by the telegraph company for transmission and delivery adequate notice was given the company of such special relations." In *Butler v.*

Telegraph Co., 77 S. C. 148, 57 S. E. Rep. 757, the question being as to the presumption of mental anguish or suffering of one who, upon the occasion of the death of his wife, was deprived of the presence of his brother-in-law in his hours of sorrow, the court laid down these propositions: "(1) That a plaintiff can only recover such damages as are the direct and proximate result of a wrongful act on the part of the defendant. (2) That mental anguish by a brother-in-law may be the result naturally and reasonably to be anticipated from the failure to deliver a telegram, but there is no presumption that such injury has been sustained. (3) That, if in the particular case one related merely by affinity sustains damages, they are special, and the defendant must have notice of the facts from which it may be reasonably expected they would arise at the time the message is delivered for transmission." We are now called on to decide whether the same rule applies to first cousins. If the reasoning of the court in that case is to be regarded, it is perfectly clear there must be some line drawn in degrees of consanguinity where the presumption of suffering and anguish for such disappointments cannot be indulged; for it is within the knowledge of all that the relationship of father-in-law, mother-in-law, brother-in-law, or sister-in-law is usually closer by intercourse and affection than that of the remoter blood relations. The reasoning and conclusion in *Butler v. Telegraph Company* are thoroughly sound, but the principle of that case would lead to absurdity, unless the court fixes some degree of blood relationship beyond which suffering and anguish will not be presumed as the results of delay in the transmission and delivery of telegrams. Our statute provides for damages for 'mental anguish or suffering.' It will not be doubted these words were intended to have their usual strong meaning. They do not give the slightest ground to impute to the general assembly an intention to incumber the administration of justice, and open the floodgates of speculative litigation by allowing suits to be brought for any unpleasant feeling or sensation, however slight. Mental suffering means distress or serious pain as distinguished from annoyance, regret, or vexation. Mental anguish is intense mental suffering. Being deprived of receiving or bestowing the ministrations of husband or wife, father, mother, brother, sister, grandparent, and grandchild in the great sorrows of life, and being deprived of attending their funeral rites produces, in every man and woman with normal affections for these near kindred, distress and serious pain; that is, mental suffering or anguish within the meaning of the statute. When we leave these close

family ties and reach the relation of uncle and aunt, niece, and nephew, and that still further removed relation of cousin, the deprivation ordinarily produces annoyance, regret, or vexation, but not a state of mind attaining to distress or mental suffering. This, we think, is the common-sense interpretation of the statute, viewed in the light of the general experience of men; and it is in accord with authority.

The following authorities support the case of *Butler v. Telegraph Company*, supra, holding there is no presumption of mental anguish arising from delay in telegrams affecting the feelings of those related by affinity: *Telegraph Co. v. Steenbergen*, 107 Ky. 469, 54 S. W. Rep. 829; *W. U. Tel. Co. v. McMillan* (Tex. Civ. App.) 30 S. W. Rep. 298; *W. U. Tel. Co. v. Garrett* (Tex. Civ. App.), 34 S. W. Rep. 649; *Davidson v. Telegraph Co.* (Ky.), 54 S. W. Rep. 830; *W. U. Tel. Co. v. Long*, 148 Ala. 202, 41 South. Rep. 965; *W. U. Tel. Co. v. Gibson* (Tex. Civ. App.), 39 S. W. Rep. 198. In *Renham v. Telegraph Co.*, 87 S. W. Rep. 788, 27 Ky. Law Rep. 999, recovery was denied to an aunt in a suit for damages for delay in a telegram announcing the death of a nephew. In *W. U. Tel. Co. v. Wilson*, 97 Tex. 22, 75 S. W. Rep. 482, it was likewise held there was no presumption that an uncle will suffer mental anguish from failure to attend his niece's funeral. In North Carolina the view is taken that any telegram announcing sickness or death is sufficient notice to the company to warrant a recovery in any case where mental anguish is shown to have resulted without respect to the relationship of the parties; but, on the trial, where the relationship does not raise the presumption of mental anguish, the damages must be affirmatively proved. The rule established in this state by *Butler's* case is that there is no presumption that telegrams announcing sickness or death involve mental anguish or suffering, rather annoyance, regret, or vexation, unless they are sent by or intended for near relations. The defendant, therefore, had a right to the instruction asked for.

The judgment of this court is that the judgment of the circuit court be reversed, and the cause remanded to that court for a new trial.

GARY, A. J. (dissenting). Conceding that there are degrees of relationship beyond which it will not be presumed that mental anguish was suffered as the result of failure on the part of the telegraph company to deliver a message promptly, nevertheless the relation of first cousin comes within the degrees giving rise to such presumption. I therefore dissent.

NOTE.—*Mental Anguish Arising from Negligence in Delivery of Telegram Presumed from Relationship of Parties*.—Right of recovery for mental suffering arising from negligence in the delivery of a telegram is of very recent organization, being first declared by the Supreme Court of Texas in 1881, and has now been adopted as law by either the courts or the legislatures of the following states: Alabama, Iowa, Kentucky, Louisiana, North Carolina, South Carolina and Tennessee. Possibly other states have adopted this new rule, whose statutes or decisions in this respect have not come to our attention.

This right of action is very bitterly opposed by the courts in other jurisdictions and is in no danger of being adopted in such jurisdictions except by fiat of the legislature. The objections to the recognition of this rule are not theoretical. Indeed, it may be admitted that the Texas court which first announced this rule had in everything the best of the argument from the standpoint of exact logic. Owing, however, to the unfortunate frailties of human nature, exact logic does not always make for exact justice. And so these other jurisdictions, while admitting the force of the argument that mental anguish wholly apart from any physical injury may be as real an injury as that occasioned by actual contact of the person, are disposed to reject it altogether on the simple ground that human ingenuity has never been able to devise any means for definitely determining or indicating the state of the human mind and that therefore such injury was incapable of any competent or adequate proof.

The experience, also, of those jurisdictions which have adopted this rule is hardly reassuring. The floodgates of litigation have been opened and juries have not always been careful in estimating the damages with the result that such litigation has become of all others the most speculative. So annoying has been this tendency that the supreme court of North Carolina has been led, while reaffirming the doctrine, to caution juries against its abuse. *Cashion v. Telegraph Co.*, 123 N. Car. 267. See remarks of Cooper, J., to same effect in *Telegraph Co. v. Rogers*, 68 Miss. 748, 24 Am. St. Rep. 300.

With this experience confronting them, it is not surprising that courts where this rule is recognized, should be inclined to limit its operation to cases where such experience has proven that it is of proper application, to-wit, in cases of blood relationship; so that it is now the rule in such jurisdictions that mental suffering arising from negligence in the delivery of a telegram will be presumed where blood relationship exists. *Cashion v. Telegraph Co.*, 123 N. Car. 267; *Western Union Tel. Co. v. Randles*, (Tex. Civ. App.), 34 S. W. Rep. 447; *Western Union Tel. Co. v. Coffin*, 88 Tex. 94. Likewise the corollary to this rule is equally well settled that no presumption of mental anguish will arise where the relationship of the parties is that of marriage or mere affinity. *Bennett v. Telegraph Co.*, 128 N. Car. 103, (father-in-law); *Telegraph Co. v. McMillan*, (Tex. Civ. App.), 30 S. W. Rep. 298, (sister-in-law); *Butler v. Telegraph Co.*, 77 S. C. 148, (brother-in-law); *Telegraph Co. v. Gibson*, (Tex.), 39 S. W. Rep. 198, (son-in-law); *Cashion v. Telegraph Co.*, 123 N. Car. 267, (brother-in-law); *Telegraph Co. v. Garrett*, (Tex.), 34 S. W. Rep. 649, (stepson); *Telegraph Co. v. Steenbergen*, 107 Ky. 469, (father-in-law); *Telegraph Co. v. Coffin*, 88 Tex. 94, (brother-in-

law); Davidson v. Telegraph Co., (Ky.), 54 S. W. Rep. 830, (son-in-law). Apparently contra: Reese v. Telegraph Co., 123 Ind. 294; Telegraph Co. v. Crocker, 135 Ala. 492.

The distinctions made by these decisions are not arbitrary, but are clearly founded on principle. Admitting the right to recover at all for mental anguish, the well-established principle announced in Hadley v. Baxendale comes into play, to-wit: that when two parties have made a contract which one of them has broken, the damages which the other ought to receive, in respect of such breach of contract, should be such as may fairly and reasonably be considered as arising *naturally* from such breach, or as may reasonably be supposed to have been in the contemplation of the parties at the inception of the contract as the probable result of a breach of it. Under this rule the mental anguish of a father may be said to arise naturally, i. e., that is in the ordinary course of nature, from a failure to be at his child's funeral where such failure is due to the negligence of a telegraph company in failing to promptly deliver to him a telegram announcing his child's death. "In such case," said the Supreme Court of Texas, in Telegraph Co. v. Coffin, supra, "upon the delivery of the message the telegraph company must have taken notice of the relationship between the parties, and from the language of the message, must have known that the purpose of sending it was to enable him to be present at the burial; therefore, that a failure to deliver the message would probably deprive him of being so present. It must also, from a knowledge of the laws of human nature, common to all, have known that such failure to be present at the funeral would cause mental suffering, because this is a common result from such a state of case. The injury in such case is the natural result of a failure to deliver the message, and must have been in the 'contemplation of the parties' when the contract for transmission was made. The facts showing liability being proved, the jury might infer the facts of mental suffering, because such is recognized as a common result under such circumstances. No proof would be required to show that mental suffering did ensue."

As a necessary corollary to the above proposition it must be recognized that there are degrees of relationship that under circumstances referred to do not create that anguish of spirit which is the only ground of recovery in this class of cases. Annoyance, disappointment or sympathy, however keen, is far from constituting mental anguish and the experience of mankind is that failure to be at the bedside of a dying friend or distant relative does not ordinarily occasion any severer strain upon the feelings than that of keen disappointment for which, of course, there can be no recovery. So, therefore, the courts are quite agreed as we have just observed, that in all cases of relationship no closer than mere affinity, mental anguish will in no case be presumed from the failure of a telegraph company to deliver a telegram. In all such cases plaintiff may prove that there were special grounds of attachment between himself and the deceased, which were as close as those of the more sacred relations of life, but even in such cases, being exceptional, and not such as may be said to "arise naturally," it would seem to be the proper rule that in order to recover "it must be proved

that at the time the message was delivered to it, the telegraph company was notified of the relations existing between the plaintiff and the deceased; otherwise the company would be regarded as only having in contemplation such results as would follow in the usual course of things." Telegraph Co. v. Coffin, supra, loc. cit. 97.

But there is an apparent exception even to the last rule, to-wit: in cases where one, expecting to arrive in a certain town late at night or at a warm season of the year or after a long trip, will not have time or opportunity to adequately prepare for the funeral of the loved one whose dead body he is bringing with him, and to notify friends or relatives, and telegraphs ahead to relatives or even friends to meet him at the train and prepare for the funeral. In such case a father, for instance, bringing his dead child to town after a journey of several days in warm weather, would be naturally expected to suffer extreme anguish to learn on his arrival that, owing to the failure to deliver a telegram, no one was at the train to assist him and that no relatives had been notified and no arrangements for the funeral made. In such cases the wording of the telegram if sufficient to notify the company that its intent is to secure necessary assistance and not merely condolence, will be sufficient notice to the company of the special nature of the message and make them liable for the mental anguish of the sender of the message irrespective of the relationship of the sendee. Western Union Telegraph Co. v. Lang, 148 Ala. 202, 41 South 965. So also where a father telegraphed to a friend of the death of his son and requested him to send a coffin which was not delivered and the funeral was delayed until the body began to decompose. Telegraph Co. v. Carter, (Tex.), 21 S. W. 688. But even in such cases the telegram must be couched in such terms as to reasonably inform the telegraph company that a failure to deliver will deprive the sender of more than the condolences of the sendee; otherwise there can be no recovery. Telegraph Co. v. Henly, (Ind. App.), 54 N. E. 775.

One more question remains to be considered, to-wit, what degrees of blood-relationship will be sufficient to create a presumption of mental anguish in such cases. Husband and wife is generally classed in a relation by itself. This relation with that of parent and child are by the absolute consensus of the world's experience declared to be the most intimate and most sacred of all human relationships. It needs no argument to support the statement that mental anguish will be presumed to *naturally* arise from negligence in delivery of a telegram announcing the sickness or death of parties sustaining such relationship to the party seeking damages for the nondelivery. But how much further shall we go in presuming mental anguish in such cases among persons related by blood? "Beyond the marriage state," says the court in Cashion v. Telegraph Co., this presumption extends only to near relatives of kindred blood, as acute affection does not necessarily result from distant kinship or mere affinity. A brother's love is sufficiently universal to raise the presumption but not so with a brother-in-law, who is often an indifferent stranger, and sometimes an unwelcome intruder into the family circle."

From a careful examination of the authorities

we reach the conclusion that no presumption of mental anguish will arise from the failure to deliver a telegram announcing death or sickness outside of the relationships of husband and wife, parent and child and brother and sister of the whole blood. The authorities have held the following blood relationships insufficient to raise the presumption: Aunt and nephew: *Denham v. Telegraph Co.*, 27 Ky., Law Rep. 999, 87 S. W. 788; uncle and nephew: *Telegraph Co. v. Long*, 148 Ala. 202, 41 South 965, uncle and niece: *Telegraph Co. v. Wilson*, 97 Tex. 22, 75 S. W. 482. In the case of *Telegraph Co. v. Crocker*, 135 Ala. 492, the relationship of grandmother and grandchild is referred to as a relation which will sustain a presumption of mental anguish, but we hardly think human experience justifies the extension of the rule beyond the relationship of brother and sister. The most prominent error in the *Crocker* case and which absolutely destroys its value as an authority is the fact that the sender in this case is the father of the child and the sendee is the maternal grandmother. The mental anguish for which the father was permitted to recover was the solace and condolence that could have been furnished to him by his mother-in-law. We confess we have been deceived in the popular conception of the mother-in-law as portrayed on the stage and in the public prints, if the fact is as the Alabama supreme court represents it to be that a man can suffer mental anguish from the absence of his mother-in-law. We confess that this may be frequently possible, but we insist that it is not the universal experience of the human race or of civilized society, and the authorities which we have already cited clearly prove this to be the consensus of judicial opinion.

ALEXANDER H. ROBBINS.

CORRESPONDENCE.

A LAYMAN'S OPINION OF LAWYERS.

Editor of Central Law Journal:

My attention has been called to an interesting article in the *Law Notes* which very pointedly refutes the oft-repeated platitude that lawyers are fit subjects for ridicule and reproach. Lawyers care little or nothing for these silly assertions, I imagine, and very wisely care but little for what the public at large thinks of them. They know full well that ninety-nine per cent of the public do not think for themselves, but swallow whole all the trite sayings handed down to them, being too indolent to think for themselves. If the bellwether jumps the fence, all the balance of the flock follows.

Nothing can be further from the truth than this systematic abuse. In a business experience as a layman of 57 years, 29 years of which my dealings were largely with lawyers, as a law publisher, I found the standard of integrity of lawyers far surpassed that of bankers, merchants, mechanics and laboring men. I will not say as to physicians and farmers, having had but little experience with them. Lawyers may owe debts they cannot pay, but they do not deny the indebtedness nor resort to quibbles which they might more effectively resort to, than laymen.

Whence comes this high standard of integrity found in the legal profession? From their edu-

cation. As is the case with army officers' integrity, it is drilled into them. Lawyers are very tenacious of being well thought of by their fellow-lawyers. Their word given to the court or to opposing counsel is as good as their bond. They may as well cease business as to acquire the reputation of being liars.

It is true that lawyers do, in a professional way, often serve mercantile tricksters, but in most instances the disreputable character of such employments are undisclosed until too late to withdraw. How few instances are encountered of misappropriation or embezzlement of funds coming into the hands of lawyers in a fiduciary capacity. Within my own experience, I have known of but one such instance.

I therefore conclude that public opinion errs in judging of lawyers. In fact, public opinion is a very unreliable tribunal. Public opinion, when sitting in judgment on integrity and morals is as frequently wrong, as right, and the blind followers of public opinion of necessity err. It was public opinion that crucified our Divine Lord. It was public opinion that burned alleged witches in New England. Juries and courts are sometimes too much influenced by public opinion. Judge Landis, in his famous Standard Oil decision, through the spectacles of public opinion, thought he discovered an offender underneath the party before the court who could endure a bigger fine than the party on trial. Courts and lawyers usually are and should be the balance wheel to correct and steady public opinion and not always to follow it. This may lead them sometimes to incur the public wrath and ridicule, but they can rest assured that the public will never lose confidence in them as the conservative force in every community.

W. H. STEVENSON.

St. Louis, Mo.

HUMOR OF THE LAW.

Counsel (addressing the judge after he had got his client, a thief, acquitted in the face of strong evidence): Your honor, I would be obliged if you would order that this man be not released from custody until to-morrow.

Judge: Certainly; but what is your reason?

"Well, you see, the road near my home is rather lonely, and as my client knows quite well that I shall have money on me he might possibly lie in wait for me."—Bon Vivant.

Joseph Chamberlain was the guest of honor at a dinner in an important city. The mayor presided, and, when coffee was being served, the mayor leaned over and touched Mr. Chamberlain, saying, "Shall we let the people enjoy themselves a little longer, or had we better have your speech now?"—Christian Register.

They were cross-examining, in a Chicago court recently, a bookmaker who had been caught in the toils for playing some other game than his own.

The third sub-assistant district attorney was intent upon a conviction, however, and was doing his best, none too successfully, to shake the testimony of the defendant.

"You're sure of that?" he yelled as the bookmaker stuck to an assertion that did not suit the case of the state.

"Sure I am certain," came the answer.

"You remember that you are under oath?"
 "I do that."
 "And you'd swear to this statement of yours?"
 "Swear to it? Why, Mr. Lawyer and judge,
 your honor, I'd bet a hundred on it any day."
 —Spare Moments

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1. **Accident Insurance**—Computing Time of Notice.—Where a policy of insurance against sickness provides that notice of the illness shall be given within ten days, Sunday is not excluded in the computation of the time.—*Craig v. United States Health & Accident Ins. Co.*, S. C., 61 S. E. Rep. 423.

2. **Notice**.—The provision of a policy of insurance against sickness providing that written notice of any illness for which claim can be made must be given the company within ten days from the beginning of illness is not unreasonable.—*Craig v. United States Health & Accident Ins. Co.*, S. C., 61 S. E. Rep. 423.

3. **Adverse Possession**—Abandonment.—Parties who had occupied only a very small portion of land for about two years, and had abandoned it before suit to quiet title, held to have no rights in the land under a claim of ten years' adverse possession.—*Hamer v. Harper*, Miss., 46 So. Rep. 707.

4. **Assessments of Taxes**.—In ejectment, where defendants claimed by adverse possession, they could show the assessments of taxes against them on the land, not to show possession, but in connection with the other evidence of actual possession, to show claim of ownership and the extent of their possession.—*Knight v. Hunter*, Ala., 46 So. Rep. 235.

5. **Interlock**.—Where there is an interlock possession of a junior grantee or adverse claimant in actual occupancy of a part of the interlock claiming the whole, held adverse possession of all the land in the interlock.—*Robinson v. Sheets*, W. Va., 61 S. E. Rep. 347.

6. **Tacking**.—Where the owner of two contiguous lots conveys one to A., and the other to B., and a controversy arises as to the boundary, A. cannot to establish adverse possession against B. tack his own possession to that of the common grantor.—*Goozee v. Grant*, Neb., 116 N. W. Rep. 508.

7. **Tax Title**.—The occupancy of realty by one who entered under life tenant will not be converted in to an adverse possession as against the remainderman, by the occupants recording a tax deed, where his relation to the property disqualifies him to acquire the title in that manner.—*Wiswell v. Simmons*, Kan., 95 Pac. Rep. 407.

8. **What Constitutes**.—Adverse possession to confer title must be actual, continuous, and hostile to the legal title for the full statutory period, and such possession must be established by clear and positive proof.—*Hyer v. Griffin*, Fla., 46 So. Rep. 635.

9. **Aliens**—Deportation.—A deportation order issued by the Secretary of Commerce and Labor held not conclusive on the officers or agents of the vessel in which the alien was brought into the United States.—*Frank Waterhouse & Co. v. United States*, U. S. C. C. of App., Ninth Circuit, 159 Fed. Rep. 376.

10. **Alteration of Instruments**—Presumptions.—Where a typewritten contract appears to have been changed after the first impression was made, the presumption is that such change was made before execution and delivery.—*Barber v. Stromberg-Carlson Telephone Mfg. Co.*, Neb., 116 N. W. Rep. 157.

11. **Appeal and Error**—Assignment of Error.—Assignments of error affected by extraneous evidence, and not made the subject of exception or bill of exception in the trial court, are not available on appeal.—*Swann v. Washington-Southern Ry. Co.*, Va., 61 S. E. Rep. 750.

12. **Instructions**.—The giving of an instruction which was not pertinent to the issue tried and which could not have prejudiced the substantial rights of the party complaining was not ground for reversal.—*Zentzshel v. Ritchey*, Ky., 110 S. W. Rep. 832.

13. **Jurisdiction**.—Where a sublessee sued out an injunction to protect him in the peaceable enjoyment of the premises and for \$2,000 damages for trespass, the value of the sublease must be considered in determining the jurisdiction of the Supreme Court.—*Hirsh v. Valloft*, La., 46 So. Rep. 103.

14. **Refusal to Sanction Certiorari**.—That the Court of Appeals may review a refusal to sanction a certiorari the petition must be incorporated in the bill of exceptions or otherwise verified as a part thereof by the trial judge.—*Clarke Bros. v. Deal*, Ga., 61 S. E. Rep. 295.

15. **Attorney and Client**—Misconduct.—Misconduct justifying the disbarment of a prosecuting attorney is such as shows the attorney to be unworthy of public confidence and an unfit person to be trusted with the duties of the profession.—*State v. Hays*, W. Va., 61 S. E. Rep. 355.

16. **Bail**—Deposits in Lieu of Bail.—Money deposited by one person as bail for another, or the

surplus thereof remaining after satisfying the state's claim, is the property of the person making the deposit, and is not subject to assignment by the one bailed.—*Doty v. Braska*, Iowa, 116 N. W. Rep. 141.

17. **Bankruptcy**—Disallowance of Claims.—An order rejecting and expunging claims of stockholders of a bankrupt corporation for money alleged to have been advanced to and expended for the corporation held properly reaffirmed.—*Laffoon v. Ives*, U. S. C. C. of App., Ninth Circuit, 159 Fed. Rep. 861.

18.—Dissolved Corporation.—A New Jersey corporation having been proclaimed against for nonpayment of New Jersey taxes held entitled to appear in bankruptcy proceedings by attorney.—*In re Munger Vehicle Tire Co.*, U. S. C. C. of App., Second Circuit, 159 Fed. Rep. 901.

19.—Mortgages.—A trustee under a trust mortgage executed by a bankrupt which was a consolidated corporation held a necessary party to a suit to set aside a transfer of the property of one of the merged companies on behalf of its creditors, or to declare such creditors' claims a first lien on such property in the hands of the consolidated corporation.—*United Sheet & Tin Plate Co. v. Hess*, U. S. C. C. of App., 159 Fed. Rep. 889.

20.—Preferences.—One held to have no reasonable cause to believe that bankrupts intended to prefer him in transferring property in his favor, within Bankr. Act, c. 541, Sec. 60b.—*Curtiss v. Kingman*, U. S. C. C. of App., First Circuit, 159 Fed. Rep. 880.

21.—Time for Taking Appeal.—Where a petition for a rehearing was filed within ten days after an order was made sustaining a demurrer to a petition in involuntary bankruptcy, an appeal taken within ten days after the petition was disposed of and the judgment of dismissal became final was in time.—*Mills v. J. H. Fisher & Co.*, U. S. C. C. of App., Sixth Circuit, 159 Fed. Rep. 897.

22. **Benefit Societies**—Insurable Interest.—The designation by an assured in a mutual benefit insurance association of a person as beneficiary having no insurable interest in the life of assured held not against public policy.—*Dolan v. Supreme Council of Catholic Mut. Ben. Assn.*, Mich., 116 N. W. Rep. 383.

23. **Bills and Notes**—Conflict of Laws.—A note executed within the state, but payable in another state, must be governed by the law of that state though given for the price of property and reserving title to the property until full payment.—*Lienkauf Banking Co. v. Haney*, Miss., 46 So. Rep. 626.

24.—Consideration.—That a note given to a near relative by a person in declining years in reward for services calls for a larger sum than the services were probably worth does not invalidate it for failure of consideration.—*Bade v. Feay*, W. Va., 61 S. E. Rep. 348.

25.—Consideration.—It was no defense to certain notes that they were given to avoid prosecution of the maker, where there was neither allegation nor proof that at the time the notes were given any criminal prosecution was pending against him, or that he was guilty of any criminal offense.—*Ferd Rueping Leather Co. v. Watke*, Wis., 116 N. W. Rep. 174.

26.—Executory Contract of Sale.—An executory contract of sale is a sufficient consideration for a note given for the price, though the goods were never delivered subject to the defenses of failure of consideration, fraud in its

procurement, payment, or set-off.—*Acme Food Co. v. Older*, W. Va., 61 S. E. Rep. 235.

27. **Bridges**—Establishment and Maintenance.—A county is a public corporation which exists only for public purposes connected with the administration of the state government, and it and its revenues are alike, where there is no express restriction subject to legislative control, and cities of the first class therein may be considered not parts of the county for bridge purposes.—*Slutts v. Dana*, Iowa, 115 N. W. Rep. 1115.

28. **Brokers**—Commissions.—Where a broker performs his part of the contract, he cannot be deprived of his commission, though, owing to the misrepresentation of the seller, the sale fails of execution.—*Hugill v. Weekley*, W. Va., 61 S. E. Rep. 360.

29.—Contract Commissions.—A broker held only entitled to recover interest on contract commissions from the average date the installments thereof were payable.—*Bankers' Loan & Investment Co. v. Spindle*, Va., 62 S. E. Rep. 266.

30. **Cancellation of Instruments**—Conditions Precedent.—Equity will not extend aid to the mortgagor to cancel a mortgage and quiet title against it where he does not offer to pay the debt secured by the mortgage lien.—*Hammond v. Erickson*, Wis., 116 N. W. Rep. 173.

31. **Carriers**—Carrying Passenger Beyond Destination.—Injuries resulting to a passenger from walking to his destination after trains had passed the station without stopping held not the natural sequence of the failure to stop the trains, and that damages would not be recoverable therefor.—*Malcomb v. Louisville & N. R. Co.*, Ala., 46 So. Rep. 768.

32.—Contributory Negligence.—In an action for damages for the death of live stock in transit, whether the shipper was negligent in failing to sufficiently shower the stock to keep down its temperature held for the jury.—*Peck v. Chicago Great Western Ry. Co.*, Iowa, 115 N. W. Rep. 1113.

33.—Injury to Alighting Passenger.—Held, that a carrier did not perform its duty to afford passengers a fair opportunity to debark by stopping the train, before reaching the usual place between rows of cars on parallel tracks.—*Smith v. North Carolina R. Co.*, N. C., 61 S. E. Rep. 266.

34.—Liability of Carrier.—Where plaintiff's horses were destroyed by a conflagration while in charge of a common carrier, the case falls under the common-law rule which makes the carrier an insurer of the goods committed to it for transportation.—*Stiles, Gaddie & Stiles v. Louisville & N. R. R. Co.*, Ky., 110 S. W. Rep. 826.

35.—Liens.—A railroad company receiving lumber from a lake carrier for storage and re-shipment at the request of an agent for its sale held entitled to a lien thereon for freight advanced.—*Bennett Bros. Lumber Co. v. Robinson*, U. S. C. C. of App., Sixth Circuit, 159 Fed. Rep. 910.

36.—Live Stock Shipment.—A common carrier of live stock is an insurer of its safe delivery; and the burden of proof is on it to show that the loss resulted from some cause which would exempt it from liability.—*Church v. Chicago B. & Q. Ry. Co.*, Neb., 116 N. W. Rep. 520.

37.—Quarantine.—Plaintiff's intestate held under the circumstances entitled to the protection of the railroad company, so that it should not have permitted his ejection from the train

by city quarantine officer rendering plaintiff entitled to compensatory damages.—*St. Louis & S. F. R. Co. v. Roane, Miss.*, 46 So. Rep. 711.

38.—**Transportation of Freight.**—Where a safe could not have arrived in time for delivery before Sunday, defendant carrier was entitled to an allowance for that day and for two days at an intermediate point in determining the length of time for which a penalty was recoverable for delay under Revisal 1905, Sec. 2839.—*Blue Ridge Collection Agency v. Southern Ry. Co.*, N. C., 61 S. E. Rep. 462.

39.—**Warehouseman.**—A carrier's liability as warehouseman of freight less than a car load did not commence until the freight had been unloaded in the warehouse, and the consignee notified that it was ready for delivery.—*Wall-Huske Co. v. Southern Ry. Co.*, N. C., 61 S. E. Rep. 277.

40.—**Chattel Mortgages.**—Judgment Liens.—A judgment lien superior in time to a mortgage lien is prima facie superior in rank as to property included in the mortgage other than that for the price of which the mortgage was given.—*Howard v. Rumble, Ga.*, 61 S. E. Rep. 297.

41.—**Colleges and Universities.**—Issuance of Diploma.—Where, under the by-laws of a medical college, the dean has the right to pass on the standing of the students applying for graduation, his report to the board of directors that a student has passed in all studies held equivalent to a recommendation to the board.—*State v. Lincoln Medical College, Neb.*, 116 N. W. Rep. 294.

42.—**Constitutional Law.**—Police Power.—Freedom to contract is not unlimited, as the lawmaking branch of the government may impose such limitations as can be reasonably considered to be for the public health, safety, and morals.—*Craig v. United States Health & Accident Ins. Co.*, S. C., 61 S. E. Rep. 423.

43.—**Contempt.**—Criticising Rulings of Court.—Every citizen has the right to criticize without any restriction the rulings of a judicial officer in an action which has been finally determined, and not be answerable otherwise than in an action triable by a jury.—*State Board of Examiners in Law v. Hart, Minn.*, 116 N. W. Rep. 212.

44.—**Contracts.**—Nonperformance.—A building contract containing no provision as to the effect of freezing weather, held that the contractor could not claim relief from liability because thereof.—*Brent v. Head, Westervelt & Co., Ia.*, 115 N. W. Rep. 1106.

45.—**Undue Influence.**—Relationship of mistress and servant, patient and nurse, aunt and nephew, do not, all combined, raise a legal presumption of undue influence.—*Bade v. Feay, W. Va.*, 61 S. E. Rep. 348.

46.—**Corporations.**—Liability for Mispayment of Dividends.—Oilmill company and person accredited with owning certain of its stock held both liable for dividends paid thereon subsequent to suit involving the ownership of the stock.—*McCord v. Nabours, Tex.*, 109 S. W. Rep. 913.

47.—**Purchase of Property.**—A corporation executing a note for the price of property received by it held not entitled to defeat a recovery on the ground that its manager who signed the note, was without authority.—*Watts Mercantile Co. v. Buchanan, Miss.*, 46 So. Rep. 66.

48.—**Ratification of Agent's Acts.**—Where a corporation ratifies or knowingly accepts the

benefits of a contract made by an agent, it can not repudiate the same.—*Barber v. Stromberg-Carlson Telephone Mfg. Co., Neb.*, 116 N. W. Rep. 157.

49.—**Transactions with Corporations.**—One advancing money to a corporation by paying the same to an officer thereof held not required to see that the money was applied for the corporation to hold the corporation liable.—*Watson v. Proximity Mfg. Co.*, N. C., 61 S. E. Rep. 273.

50.—**Counties.**—Illegal Taxes.—A county has no vested right in a public fund created by the levy of taxes under an unconstitutional act for the benefit of high school districts and voluntarily paid by the taxpayers.—*School District No. 30, Cuming County, v. Cuming County, Neb.*, 116 N. W. Rep. 522.

51.—**Refusal to Allow Claim.**—When funds in the county treasury may be distributed only on warrants authorized by the county board, a claim therefor may be filed with the county board, and an appeal may be prosecuted from its rejection.—*School Dist. No. 30, Cuming County v. Cuming County, Neb.*, 116 N. W. Rep. 522.

52.—**Criminal Evidence.**—Admissibility.—Defendant's consent to be searched for \$10 did not include the disclosure of a pistol which he was attempting to keep concealed, and reference to the pistol was inadmissible against the defendant, who had not been legally arrested.—*Davis v. State, Ga.*, 61 S. E. Rep. 404.

53.—**Petition for Certiorari.**—A copy of the accusation or indictment on which defendant was convicted need not be attached to his petition for certiorari, nor is it required that such copy be presented or identified by the trial court prior to the coming in of the answer to the writ of certiorari.—*Green v. State, Ga.*, 61 S. E. Rep. 234.

54.—**Criminal Law.**—Attempt.—The rule that to constitute an attempt to commit an offense, the act must be a possibility, has no application where the crime becomes impossible either by outside interference or miscalculation as to a supposed opportunity.—*Stokes v. State, Miss.*, 46 So. Rep. 627.

55.—**Attempt.**—Whenever the design of a person to commit crime is clearly shown, slight acts done in furtherance of this design will constitute an attempt.—*Stokes v. State, Miss.*, 46 So. Rep. 627.

56.—**Limitations.**—Under Code 1906, Secs. 1414, 1415 (Ann. Code 1892, Secs. 1342, 1343), limiting the time of prosecutions and providing what shall be the commencement of a prosecution, held that the court would not assume that defendant was bound over within a certain time after a specified date, so as to bring the prosecution within the statute.—*Hatton v. State, Miss.*, 46 So. Rep. 708.

57.—**When Appellant Pays Fine.**—Where plaintiff in error on whom an alternative sentence permitting payment of fine has been imposed has paid the fine, the writ of error will be dismissed.—*Kitchens v. State, Ga.*, 61 S. E. Rep. 736.

58.—**Criminal Trial.**—Conviction.—That, on several defendants demanding separate trials, the commonwealth elected to try a particular one of them, does not prevent it from electing to try another on a mistrial or reversal of a conviction, and grant of a new trial as to the first one selected.—*Napier v. Commonwealth, Ky.*, 110 S. W. Rep. 842.

59.—**Error in Continuing Case.**—Error in

continuing a case did not entitle accused to be discharged, and is no ground for reversing a conviction.—*Ashlock v. Commonwealth, Va.*, 61 S. E. Rep. 752.

60.—**Former Jeopardy.**—A verdict for manslaughter under an indictment charging murder in the first degree held an acquittal of murder, and on a new trial defendant cannot be tried for any crime higher than manslaughter.—*West v. State, Fla.*, 46 So. Rep. 93.

61.—**Identity of Accused.**—Where a person is indicted by the name of "Jno." M., and his identity is not questioned, and the defendant uses on the record the names Jno. M. and John M. indifferently, a verdict convicting him as "John" M. held not error.—*McDonald v. State, Fla.*, 46 So. Rep. 176.

62. **Customs and Usages—Reasonableness.**—Reasonable and just rules and customs of a certain business held to have been contemplated in making a contract involving that business.—*Consolidated Kansas City Smelting & Refining Co. v. Gonzales, Tex.*, 109 S. W. Rep. 946.

63. **Damages—Breach of Agreement to Pay Money.**—Damages for breach of an agreement to pay money are capable of exact measurement in contemplation of law, and the measure of damages is as a general rule the principal sum with legal interest thereon from the time the payment was due.—*Colonna Dry Dock Co. v. Colonna, Va.*, 61 S. E. Rep. 770.

64.—**Excessive Verdict.**—Where the result of a wound was the permanent disfigurement of plaintiff's hand, the bones having been broken, and the injured hand having shrunk up, and no known operation would relieve her, a verdict of \$4000 was not excessive.—*Fitzgerald v. International Flax Twine Co., Minn.*, 116 N. W. Rep. 475.

65.—**Liquidated Damages.**—Where it is difficult to accurately determine the damages caused by the failure of a party to a contract to perform, the parties themselves may agree upon such sum as in their judgment will be compensation for the breach.—*Ross v. Loescher, Mich.*, 116 N. W. Rep. 193.

66. **Divorce—Abandonment.**—Where a wife abandons her husband without just cause, and thereafter becomes insane, a cause of action for divorce does not accrue until two years exclusive of the time she is insane.—*Kirkpatrick v. Kirkpatrick, Neb.*, 116 N. W. Rep. 499.

67.—**Custody of Children.**—A husband having obtained judgment of final divorce, with custody of minor children, cannot abdicate his trust by a subsequent agreement, and such agreement, vesting in her the temporary custody of the children, is no bar to his recovering possession.—*Farr v. Emuy, La.*, 46 So. Rep. 142.

68. **Easements—Extent of Way.**—A conveyance of a part of premises having as an appurtenance a right of passway held to subtract nothing from the easement as originally created as to the portion of the premises retained by grantor.—*Sweeney v. Landers, Frary & Clark, Conn.*, 69 Atl. Rep. 566.

69. **Ejectment—Executory Contracts.**—The vendees in an executory land contract in actual possession of the land are the persons entitled to maintain ejectment against the one ousting them therefrom, and not the vendors.—*Kuite v. Sage, Mich.*, 116 N. W. Rep. 467.

70. **Eminent Domain — Easements.**—Under Code 1904, Sec. 1105f (3)-(6), authorizing the condemnation of "lands or any interest or estate therein, or materials or other property," an

easement of right of way is subject to condemnation.—*Swann v. Washington-Southern Ry. Co., Va.*, 61 S. E. Rep. 750.

71.—**Extent of Damage.**—Const. 1902, Sec. 58 (Code 1904, p. cccxii), held, in so far as it relates to property damaged, merely to provide a new right of action, and that the word "damaged" was used with the same meaning that it had at common law, not damage to the feelings, tastes or sentiments, but physical damage to the corpus or to some right of property appurtenant thereto.—*Lambert v. City of Norfolk, Va.*, 61 S. E. Rep. 776.

72. **Equity—Judgment for Damages.**—Equity cannot undertake to give damages save ancillary or auxiliary to some one of the recognized subjects of jurisdiction, and then only such damages are awarded as may be necessary to do full justice by way of compensation.—*Colonna Dry Dock Co. v. Colonna, Va.*, 61 S. E. Rep. 770.

73.—**Judgment Pro Confesso by One of Several Defendants.**—Where several defendants are joined in a bill and a pro confesso taken against one, plaintiff is not entitled to final judgment against him, if the trial of the issues raised by the answering defendants establish his nonliability.—*Kennedy v. East Union Lumber & Mfg. Co., Miss.*, 46 So. Rep. 625.

74.—**Specific Performance.**—Before equity will specifically enforce a contract, the contract must be clearly and distinctly shown, and it must be reasonable and mutual, and founded on at least a meritorious consideration.—*Colonna Dry Dock Co. v. Colonna, Va.*, 61 S. E. Rep. 770.

75. **Estoppel—Covenants.**—Where a grantor conveys land by general warranty, such covenant passes to the covenantee by estoppel a pre-existing outstanding title subsequently acquired by the grantor.—*Blake v. O'Neal, W. Va.*, 61 S. E. Rep. 410.

76. **Evidence—Declarations of Grantor.**—Declarations by a grantor in a deed made after such conveyance that another is owner of the land, or that the grantee holds in trust for him, are inadmissible to impair the rights of the grantee.—*Crawford v. Workman, W. Va.*, 61 S. E. Rep. 322.

77.—**Self Serving Declarations.**—A telegram sent by a party to a contract to the adverse party after the breach thereof by the latter held a self-serving declaration and inadmissible in an action by the party for breach of contract.—*Texas Brokerage Co. v. John Barkley & Co., Tex.*, 109 S. W. Rep. 1001.

78. **Executors and Administrators — Claims Against Estate.**—Where a testator in his lifetime promises that parties taking up his notes shall be reimbursed out of his estate, the notes must be taken up in his lifetime in order to create a liability against the estate.—*Gaston v. Gaston S. C.*, 61 S. E. Rep. 393.

79.—**Limitations of Action.**—Where a partner dies, and the surviving partner makes an assignment, limitations run against the holder of a firm note in favor of the estate of decedent.—*In re Neher's Estate*, 109 N. Y. Supp. 1090.

80.—**Removal.**—Where an heir before her appointment as administrator withdrew from the hands of the factor of the intestate certain funds standing to the credit of the deceased on the factor's books, claiming that they belonged to her, held not ground for her removal as administrator.—*Hansell v. Hickox, La.*, 46 So. Rep. 784.

81. **Fines—Rights and Remedies of Informer.**—To entitle an informer or person prosecut-

ing to any part of the fines imposed on conviction under indictment his name as such must be indorsed on or written at the foot of the indictment before it is presented to the grand jury under Code 1899, c. 36, Sec. 2 (Code 1906, Sec. 1159).—*State v. Parkins*, W. Va., 61 S. E. Rep. 337.

82. **Fraud—Damages.**—Where a plaintiff is induced to furnish land as a part of the consideration for a transaction between others by fraudulent representations of the one to whom it is conveyed, the remedy held to be in law for damages.—*Guilfoyle v. Pierce*, 109 N. Y. Supp. 924.

83. **Frauds, Statute of—Parol Contract.**—A parol contract for the sale of land is not binding, and the vendor may, after demanding possession, sue to rescind the contract and recover possession.—*May v. May*, Ky., 110 S. W. Rep. 808.

84. **Part Performance.**—The doctrine of part performance by the buyer, such as paying the purchase price and the like, to take a contract out of the statute of frauds, obtains only in equity, and has no place in an action at law for damages founded on the contract.—*Franklin v. Matoa Gold Min. Co.*, U. S. C. C. of App., Eighth Circuit, 158 Fed. Rep. 941.

85. **Fraudulent Conveyances**—Payment of Debt to Wife.—If one lent her husband money received as a bridal present, and as the profits from her business, he thereby became indebted to her and could legally pay her the debt, which she could enforce against him.—*Parker v. Fenwick*, N. C., 61 S. E. Rep. 378.

86. **Garnishment—Property Subject.**—The maker of a note is not chargeable as garnishee of the payee while the note is current as negotiable paper and subject to transfer to a bona fide purchaser without notice before maturity.—*Wohl v. First Nat. Bank*, Ala., 46 So. Rep. 231.

87. **Homicide—Attempt.**—Where defendant attempted to procure R. to kill a third party, and started with R. to the point where the killing was to occur, but was arrested, the act was an attempt to commit a crime within Code 1906, Sec. 1049.—*Stokes v. State*, Miss., 46 So. Rep. 627.

88. **Manslaughter.**—Where accused intentionally pointed the gun at the deceased, and it was then discharged causing death, or if accused was guilty of culpable negligence in the way he handled the gun, and by such negligence the gun was discharged, he would be guilty of manslaughter.—*State v. Limbrick*, N. C., 61 S. E. Rep. 568.

89. **Husband and Wife—Alimony.**—Temporary alimony may be granted where defendant is without estate or certain income, but is able by use of his faculties to provide reasonable maintenance for his wife.—*Messervy v. Messervy*, S. C., 61 S. E. Rep. 442.

90. **Community Property.**—The husband is the proper party to protect all claims based on community property or to recover wages of the wife for services rendered prior to a separation and the wife has no right of intervention in such action, except as to what may have become her separate property.—*Michael v. Rabe*, Tex., 109 S. W. Rep. 939.

91. **Intoxicating Liquors—Civil Damage Law.**—Saloon keeper held liable under civil damage law for injuries from intoxication by liquors sold by person left in charge of saloon, though such person received no compensation.—*Dice v. Sherberneau*, Mich., 116 N. W. Rep. 416.

92. **Local Option Law.**—Where a local option election resulted in prohibition, a conviction might be had for violating the law pursuant to such election, though another election had subsequently been held with a similar result.—*Johnson v. State*, Tex., 109 S. W. Rep. 936.

93. **Sale to Minor.**—Whether one charged with furnishing liquors to a named minor exercised due diligence to find out his age and was honestly mistaken is a question for the jury.—*Askew v. State*, Ga., 61 S. E. Rep. 737.

94. **Judgment—Foreign Judgments.**—Record of court of limited jurisdiction in garnishment in a foreign state must show that garnishee, a foreign corporation, had submitted itself to the jurisdiction of such court.—*Rykard v. Seaboard Air Line Ry.*, S. C., 61 S. E. Rep. 252.

95. **Opening or Vacating.**—A direct attack upon a judicial proceeding is an attempt to avoid or correct it in a manner provided by law, and the proper method is to bring forward the action and vacate the judgment.—*Bickford v. Bickford*, N. H., 69 Atl. Rep. 579.

96. **Justices of the Peace—Equitable Jurisdiction.**—Though a justice has no jurisdiction to enforce an equitable lien, he has jurisdiction to enforce the collection of money which equitably belongs to a party.—*United States Fidelity & Guaranty Co. v. A. F. Messick Grocery Co.*, N. C., 61 S. E. Rep. 375.

97. **Licenses—Authority of Municipalities.**—Laws 1907, p. 48, c. 5597, Schedule B, authorizing the imposition of a license tax by cities of 1,000 to 3,000 inhabitants on any express company in a sum not to exceed \$25, and chapter 5811, do not authorize a city of that class to impose such license tax for a greater amount.—*State v. Lewis*, Fla., 46 So. Rep. 630.

98. **Life Estates—Mortgages.**—Mortgagee of a life estate in possession cannot as against the remainderman acquire a tax title based on taxes accruing during his occupancy.—*Wiswell v. Simmons*, Kan., 46 So. Rep. 407.

99. **Life Insurance**—Overdue Premiums.—Where a draft for a premium was not mailed until after the premium matured, the policy expired according to its terms, but if the premium was received and credited, the forfeiture was waived.—*Mutual Reserve Fund Life Assn. v. Tuchfeld*, U. S. C. C. of App., Sixth Circuit, 159 Fed. Rep. 833.

100. **Presumptions.**—The mere delivery of a life policy, acknowledging payment of premium without demanding the payment thereof, raises a presumption that a credit is extended.—*Cauthen v. Hartford Life Ins. Co.*, S. C., 61 S. E. Rep. 428.

101. **Limitation of Actions—Waiver of Bar.**—A stipulation in a note that the payee or holder may extend it as often as required without notice and without prejudice to his right to enforce payment at any time held not an agreement to waive the bar of limitations.—*Allen v. Allen's Estate*, Neb., 116 N. W. Rep. 509.

102. **Lotteries—Recovery of Price Paid.**—The rule that courts will not permit the recovery of the consideration paid on an executed contract prohibited by statute does not apply to the vendee of a lottery ticket for whose benefit Code Cr. Proc. Sec. 225, was enacted; the statute imposing no penalty on the vendee.—*Becker v. Wilcox*, Neb., 116 N. W. Rep. 160.

103. **Mandamus**—Issuance of Diploma.—Where the dean of a medical college has reported to the directors that a student has passed all examinations, and the directors arbitrarily

refuse to issue a diploma, its issuance may be compelled by mandamus.—*State v. Lincoln Medical College, Neb.*, 116 N. W. Rep. 294.

104.—**Payment of Salary.**—An officer of a municipal corporation may by mandamus compel the payment of his salary, though he has assigned the same.—*Granger v. French, Mich.*, 116 N. W. Rep. 181.

105.—**Master and Servant—Assumed Risk.**—An employee who had been engaged for several months with others in operating a pile driver, and who was killed by the falling of a pile while the appliances used were the same and were operated in the same manner as usual, held to have assumed the risk as a danger of his employment.—*Kirkpatrick v. St. Louis & S. F. R. Co.*, U. S. C. C. of App., Eighth Circuit, 158 Fed. Rep. 855.

106.—**Assumption of Risk.**—A servant assumes all the ordinary risks of his employment of which he is aware or which by the exercise of reasonable care and attention he should be aware, but he does not assume risks caused by the master's negligence nor such as are latent.—*German-American Lumber Co. v. Brock, Fla.*, 46 So. Rep. 740.

107.—**Concurrent Negligence.**—An employee injured by the concurrent negligence of the employer in failing to furnish a safe place to work, and co-employees, held entitled to recover.—*Kroeger v. Marsh Bridge Co.*, Iowa, 116 N. W. Rep. 125.

108.—**Contract of Employment.**—Where defendant hired plaintiff and gave him the use of a house, reserving the parlor to store his furniture, defendant had no right to use such parlor for boarding other employees.—*Bates v. Davis*, 109 N. Y. Supp. 1094.

109.—**Duty to Safeguard Machinery.**—The duty of a master to safeguard machinery held a duty only owing to such persons as in the course of their employment are required to use it.—*Stodden v. Anderson & Winter Mfg. Co.*, Iowa, 116 N. W. Rep. 116.

110.—**Employment of Minor.**—A master must protect minors working about dangerous machinery, and publish and enforce rules sufficiently clear as to be capable of being intelligently understood and obeyed.—*Fitzgerald v. International Flax Twine Co.*, Minn., 116 N. W. Rep. 475.

111.—**Fellow Servant.**—Where a locomotive engineer and a switchman are members of a switching crew, they are fellow servants, and there can be no recovery for injuries to the switchman from the negligence of the engineer.—*Day v. Louisiana Western R. Co.*, La., 46 So. Rep. 203.

112.—**Independent Contractors.**—An expressman held an independent contractor, and not defendant's servant, thus relieving defendant from responsibility for his negligence.—*Burns v. Michigan Paint Co.*, Mich., 116 N. W. Rep. 182.

113.—**Injury to Servant.**—A servant injured while operating a planer because of the absence of the hood, held not to have assumed the risk.—*Bennett v. Carolina Mfg. Co.*, N. C., 61 S. E. Rep. 463.

114.—**Injury to Servant.**—Whether a servant has the right to rely on the promise of the master to remedy a defect in an appliance depends upon the question whether to do so would be so imminently dangerous that no man of ordinary prudence would longer use it.—*Brown v.*

Musser-Sauntry Land, Logging & Mfg. Co., Minn., 116 N. W. Rep. 218.

115.—**Negligence.**—Defendant railroad company held negligent in furnishing a brakeman with an unsafe push pole with knowledge that it was unfit for use, though an extra pole was in the yard, which defendant had not installed on the engine.—*Pennsylvania R. Co. v. Forstall*, U. S. C. C. of App., Second Circuit, 159 Fed. Rep. 893.

116.—**Right to Rely on Signals.**—A servant engrossed in his work has a right to rely on customary signals, and is not bound to anticipate negligence on the master's part in failing to give them.—*Fitzgerald v. International Flax Twine Co.*, Minn., 116 N. W. Rep. 475.

117.—**Safe Instruments.**—A master was not required to provide a motor with brakes sufficient to guard the motorman against his own negligence.—*Clinchfield Coal Co. v. Wheeler's Admr.*, Va., 62 S. E. Rep. 269.

118.—**Safe Instruments.**—A master is bound to exercise ordinary and reasonable care in providing the servant with safe machinery and suitable instrumentalities for his work, and a failure so to do renders the master liable for the injuries proximately resulting therefrom.—*German-American Lumber Co. v. Brock, Fla.*, 46 So. Rep. 740.

119.—**Safe Place to Work.**—A master held not liable for the death of a workman who was killed while digging a pit by the falling upon him of a stack of iron plates which had been piled by him or his fellow workmen near the side of the excavation causing it to cave in.—*Morgan Const. Co. v. Frank*, U. S. C. C. of App., Sixth Circuit, 158 Fed. Rep. 964.

120.—**Safe Place to Work.**—In an action for injuries to a coal miner by the fall of a portion of the roof of a hallway, defendant held negligent in failing to make a proper inspection of the roof prior to the accident.—*Norton Coal Co. v. Murphy*, Va., 62 S. E. Rep. 268.

121.—**Mines and Minerals—Reservations in Deeds.**—A clause in a deed, reserving to the grantor the right to all minerals in and under a certain portion of the land conveyed, held to reserve not only solid minerals, but also petroleum oil and natural gas.—*Sult v. A. Hochstetter Oil Co.*, W. Va., 61 S. E. Rep. 307.

122.—**Rights of Locator.**—Plaintiff's predecessors having discovered gold within the original limits of their claim, such discovery conferred no rights to an overlap included with an extension of the boundaries of plaintiffs' claim of which defendants were in possession, and on which they subsequently made a discovery without opposition.—*Biglow v. Conradt*, U. S. C. C. of App., Ninth Circuit, 159 Fed. Rep. 868.

123.—**Monopolies—Combination in Restraint of Trade.**—An agreement between retail lumber dealers, whereby one dealer agrees to "protect" the other by asking a higher price than the other for the same bill of lumber submitted to both for prices, held in violation of the anti-trust act, (Laws 1905, p. 636, c. 162).—*State v. Adams Lumber Co.*, Neb., 116 N. W. Rep. 302.

124.—**Municipal Corporations—Officers and Employees.**—A board of police and fire commissioners held not authorized to accomplish indirectly by discharging entire fire department and reappointing all but certain members what they could not do directly; the removing of such members in violation of rules of the board enacted under statutory provisions.—*Combs v. Bonnell*, Ky., 109 S. W. Rep. 898.

125. **Names**—*Idem Sonans*.—The doctrine of *idem sonans* is unavailable to cure variations in the spelling of a name, unless the combination of letters and syllables produce the same sound as the true name.—*Steinman v. Jessee*, Va., 62 S. E. Rep. 275.

126. **Negligence**—*Liability of Vendors Selling Dangerous Substances*.—Where defendant sold gunpowder to plaintiff, a child 12 years old, who, while attempting to ignite a fuse inserted in a can in which he had placed the powder, was injured by a premature explosion, the question whether defendant's negligence in selling the powder was the proximate cause of the injury held one for the jury.—*McEldon v. Drew*, Iowa, 116 N. W. Rep. 147.

127.—**Pleading**.—Where negligence is the basis of recovery, the declaration should allege the negligent act or omission, and also the injury sustained and facts showing that the injury was a proximate result of the negligence alleged.—*German-American Lumber Co. v. Brock*, Fla., 46 So. Rep. 740.

128.—**Res Ipsa Loquitur**.—The mere fact that a "tie jack" weighing 300 pounds used in laying railroad ties, and which, if properly handled with ordinary care, could not fall from the car upon which it was used, did so fall, raises the presumption of negligence.—*Gurdon & Ft. Smith Ry. Co. v. Calhoun*, Ark., 109 S. W. Rep. 1017.

129.—**Use of Flue**.—Whether defendant was negligent in using a terra cotta flue depended on whether a man of ordinary prudence, having due regard to the safety of his own and the property of others, would have used a flue of such material.—*S. R. Fowle & Son v. Atlantic Coast Line R. Co.*, N. C., 61 S. E. Rep. 262.

130. **Notice**—*Necessity*.—When a statute confers power upon a judicial or an administrative agency to render a judgment or make an order affecting rights of persons or property and no provision is made for notice, the court will require a reasonable notice.—*Bank of North Wilkesboro v. Wilkesboro Hotel Co.*, N. C., 61 S. E. Rep. 570.

131. **Nuisance**—*Proof Required to Warrant Injunction*.—When injunction is sought to restrain that which it is apprehended will create a nuisance, the proof must show that the apprehension of material and irreparable injury is well grounded upon a state of facts from which it appears that the danger is real and immediate.—*Cherry v. Williams*, N. C., 61 S. E. Rep. 267.

132. **Officers**—*Effect of Resignation*.—A written resignation delivered to the board or officer authorized to receive it and to fill the vacancy thereby created is *prima facie*, but not conclusive evidence of an intention to relinquish the office.—*State v. Ladeen*, Minn., 116 N. W. Rep. 486.

133. **Partnership**—*Distribution of Assets*.—On the dissolution of a partnership by a decree of court where the assets include stock in corporations, it is within the discretion of the court to divide the same in specie when other assets are sufficient to pay all obligations of the firm.—*Ruggles v. Buckley*, U. S. C. C. of App., 158 Fed. Rep. 950.

134.—**Negotiable Instruments**.—If, at the instance and in the presence of a partner, the name of the firm is signed by another to a note under seal, such note has the same legal effect as if such member had physically signed it.—*Merchant's & Farmers' Bank v. Johnston*, Ga., 61 S. E. Rep. 543.

135. **Pledges**—*Choses in Action*.—Where, in an action on a note, defense is made that payee failed to collect notes pledged as collateral, defendant must show that the failure to collect was due to payee's negligence, and that damage resulted to him.—*Spires v. Southern States Phosphate and Fertilizer Co.*, Ga., 61 S. E. Rep. 300.

136. **Process**—*Alias Summons*.—Where an original summons not being served is attached to an alias summons which is personally served, a defect in the alias summons, the original, being correct, does not oust the court of jurisdiction of the person.—*Conroy v. Bigg*, 109 N. Y. Supp. 914.

137.—**Service of Summons**.—The court acquires jurisdiction on the proper service of summons, and it is immaterial that the officer serving it does not file his return until after the answer day.—*Pitman v. Heumeier*, Neb., 84 N. E. Rep. 1083.

138. **Prohibition**—*Injunction*.—Where a rule against applicant for injunction to show cause has been made absolute, and another application for injunction is made, prohibition will not lie to restrain the court from enforcing execution of the writ of seizure and sale to restrain which injunction was asked.—*Josephson v. Powers*, La., 46 So. Rep. 266.

139. **Railroads**—*Injury to Pedestrian at Crossing*.—In an action for injuries to a pedestrian at a railroad crossing, the court should have charged that he was negligent, and then submitted defendant's duty after discovering plaintiff on or in close proximity to the track.—*Arkansas Cent. R. Co. v. Fain*, Ark., 109 S. W. Rep. 514.

140.—**Injury to Person on Track**.—An engineer discovering a trespasser on the track cannot be deemed negligent because he shouted a warning instead of sounding the danger signal; the error being one of judgment on a sudden emergency.—*Jones v. Sibley, L. B. & S. Ry. Co.*, La., 46 So. Rep. 61.

141.—**Negligence**.—It was negligence for a railroad company to operate a train through the country at night at 30 miles an hour without a headlight.—*Gorton v. Harmon*, Mich., 116 N. W. Rep. 443.

142.—**Placing Canvas Covers Over Trees Near Railroad Track**.—Landowners near a railroad held entitled to place a canvas cover over plants growing on the land, and the mere fact that the cover is within reach of sparks from passing locomotives held not to relieve the railroad company from liability for negligence in permitting the escape of sparks.—*Benedict Pineapple Co. v. Atlantic Coast Line R. Co.*, Fla., 46 So. Rep. 732.

143. **Rape**—*Previous Chaste Character*.—On a trial for illicit intercourse with a female under the age of 18, it is sufficient if the jury be satisfied beyond a reasonable doubt that prosecutrix was not previously unchaste, and her evidence that she was not is not required to be corroborated.—*Leedom v. State*, Neb., 116 N. W. Rep. 496.

144. **Sales**—*Caveat Emptor*.—In an action for the price of an ice plant purchased with full knowledge of its condition, defendant held not entitled to set off a claim for damages for false representations as to the daily capacity of the plant.—*Williamson v. Holt*, N. C., 61 S. E. Rep. 384.

145.—**Recission**.—In an action on a note for the price of goods, recovery is limited to the difference between the contract price and the value of the property, where, before title pass-

ed, the buyer notified the seller of his intention not to accept the goods.—*Acme Food Co. v. Older*, W. Va., 61 S. E. Rep. 235.

146.—**Rescission by Vendor.**—Where, after a sale of personal property on time, the vendor fearing that the contract may be impeached for incompetency of the vendee, takes possession, the vendee may treat the unauthorized act as a rescission of the sale, and urge it as a defense in an action for the price.—*Boggs v. Young*, Neb., 116 N. W. Rep. 501.

147.—**Sheriffs and Constables—Powers.**—The fact that one is a deputy sheriff does not entitle him to any more rights or privileges in the yards of a railroad company than any other person except while in the performance of official duty.—*Texas & N. O. R. Co. v. Parsons*, Tex., 109 S. W. Rep. 240.

148.—**Specific Performance—Contract to Convey Land.**—Plaintiff having performed an agreement to care for deceased and his wife during their last sickness in consideration of deceased's agreement to give plaintiff the homestead and its contents, plaintiff was entitled to a decree securing the title to the property in her.—*Cook v. Ely*, Iowa, 116 N. W. Rep. 129.

149.—**Laches.**—Where a vendee of land delays suit for specific performance unreasonably, and there has come a great increase in the value of the land, equity will refuse to enforce the contract.—*Crawford v. Workman*, W. Va., 61 S. E. Rep. 319.

150.—**States—Officers.**—Persons who hold a state office, except justices of the peace and officers of the militia, are ineligible to membership in the general assembly, under Const. art. 3, sec. 4, par. 7, Civ. Code 1895, sec. 5754.—*McWilliams v. Neal*, Ga., 61 S. E. Rep. 721.

151.—**Statutes—Construction.**—The maxim that the expression of one thing in a statute is the exclusion of others not expressed held only a guide to the legislative intent.—*City of Lexington v. Commercial Bank*, Mo., 108 S. W. Rep. 1095.

152.—**Street Railroads—Injury to Alighting Passenger.**—In an action against a street railway company for injuries to a passenger after alighting from a car, evidence held to warrant a finding that defendant was negligent in stopping its car where it did without informing her of the dangerous condition of street.—*Spangler v. Saginaw Valley Traction Co.*, Mich., 116 N. W. Rep. 373.

153.—**Injury to Passenger.**—In an action for death of passenger, whether defendant was guilty of negligence in operating street cars with a space of only six inches between them in passing each other with unguarded openings held for the jury.—*Gage v. St. Louis Transit Co.*, Mo., 109 S. W. Rep. 13.

154.—**Taxation—Tax Title.**—Where one disqualified to acquire a tax title based on current taxes takes an assignment of an outstanding tax sale certificate, and thereafter pays subsequently accruing taxes and causes them to be indorsed on the certificate, a tax deed issued thereon conveys no title.—*Wiswell v. Simmons*, Kan. 96 Pac. Rep. 407.

155.—**Trial—Illustrations.**—Illustrations which are apt and are not so extended as to withdraw the attention of the jury from the issue are not generally erroneous.—*Neel v. Powell*, Ga., 61 S. E. Rep. 729.

156.—**Trusts—Constructive Trusts.**—Where a mother, in view of death, conveys her real es-

tate to her husband, on his promise to devise the same to their demented child and care for him during the father's life, equity may declare the grantee trustee *ex maleficio* for the protection of the intended beneficiary.—*Scherneringer v. Scherneringer*, Neb., 116 N. W. Rep. 491.

157.—**Legal Title.**—As between the grantor and the trustee, a deed granting the land to the trustee for the use of a third person vests the legal title in the trustee under the statute of grants, independently of the statute of uses.—*Blake v. O'Neal*, W. Va., 61 S. E. Rep. 410.

158.—**Vendor and Purchaser—Bona Fide Purchaser.**—Where the widow appears on the face of the succession records, and the records deports the succession as owner of land, and no equities in favor of the children appear, third persons are protected from attack by the children.—*Warner v. Hall & Legan Lumber Co.*, La., 46 So. Rep. 108.

159.—**Default of Vendee.**—A vendor held entitled to restitution for the vendee's default unless the vendee within the statutory period pays the installments due under the contract at the time suit was brought with interest at the contract rate from the date of the judgment.—*Murphy v. McIntyre*, Mich., 116 N. W. Rep. 197.

160.—**Warehousemen—Bona Fide Holders.**—A bona fide pledgee for value of a warehouse receipt is vested with an indefeasible title to the property which cannot be incumbered by any act of its pledgor or warehouseman.—*Bank of Sparta v. Butts*, Ga., 61 S. E. Rep. 298.

161.—**Waters and Water Courses—Damage from Flooding.**—Where a person's land is flooded because of a lawful erection by another on his own land, no cause of action arises on account of the construction itself, but the gist of the injured person's action is the damage from flooding, for which successive actions may be brought for recurring injuries.—*American Locomotive Co. v. Hoffman*, Va., 61 S. E. Rep. 759.

162.—**Wills—Intention of Testator.**—The intention of testator by a devise to a brother and sister by name, "or their heirs," held to show an intention to deal with the heirs of his brothers and sisters as a class, and not as individuals, so that their heirs take per stirpes, and not per capita.—*Dunihue v. Hurd*, Tex., 109 S. W. Rep. 1145.

163.—**Mental Capacity.**—It is not error in instructing as to the mental capacity necessary to make a deed to refer by way of illustration to that required to make a will.—*Neel v. Powell*, Ga., 61 S. E. Rep. 729.

164.—**Witnesses—Competency.**—In an action for injuries to a brakeman by the breaking of a defective clevs on a brake chain, testimony of a former car inspector of defendant who had done that work for 25 years as to the usual and proper manner of inspecting cars on defendant's road held admissible.—*Missouri, K. & T. Ry. Co. of Texas v. Blachley*, Tex., 109 S. W. Rep. 995.

165.—**Husband as Witness Against Wife.**—Under Rev. Civ. Code, art. 2281, a husband cannot give testimony as to his pecuniary condition in proceedings for the allowance of alimony to a wife in an action for separation from bed and board, and where evidence on that subject has been received from him, the court will not give it effect, though no bill of exceptions has been reserved.—*Nissen v. Farquhar*, La., 46 So. Rep. 679.

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RIGHT OF EQUITY TO RESTRAIN CRIMINAL PROCEEDINGS INSTITUTED VEXATIOUSLY OR TO AFFECT THE EXERCISE OF CIVIL RIGHTS.

Of course the general rule is that equity will not use its extraordinary power of restraint to interfere with the enforcement of the criminal law. But notable exceptions have been made to this rule. Among these is the one which we desire to discuss in this editorial, to-wit: Where the enforcement of the criminal law on the part of the proper officers is so evidently malicious, annoying and without foundation, as to injuriously and irreparably affect the civil rights of the party thus persecuted.

We were led into a discussion of this question by a careful reading of the facts in the case of *Ulster Square Dealer v. Fowler*, 111 N. Y. Supp. 16. The plaintiff was a weekly newspaper, very radical and pessimistic, and much disliked in the neighborhood in which it is published. It seemed to cater to the most "undesirable" class in its circle of influence, and had made personal attacks upon citizens of high standing in the community, which were apparently so reckless and scurrilous as to arouse public opinion to the point where it demanded of the officers of the law that they suppress the sheet. The methods selected to meet this situation were not such as to reflect credit on the community. Instead of proceeding against the publisher as for criminal libel, and thus give him the opportunity to prove the truth of the serious charges he had made against leading citizens, the police department ordered the suppression of every issue which should contain any matter deemed "unlawful," because injurious to the moral welfare. This order was, in reality, a censorship of plain-

tiff's publication, which he refused to permit, and resulted in his successful application to equity for permanent relief from what the court termed a "continuous trespass on his constitutional right freely to speak, write or publish his sentiments on all subjects." The court said: "No one can take upon himself the right of suppressing in advance the publication of the printed sentiments of another citizen on any public or private question. The defendants assert, however, that whatever they have done in the past in regard to the plaintiff's newspaper and intend to do in the future is but an enforcement of the criminal law, and that, therefore, this court should not lend its injunctive process to restrain them. They rely on *Delaney v. Flood*, 183 N. Y. 323, 76 N. E. 209, 2 L. R. A. (N. S.) 678, 111 Am. St. Rep. 759, in support of this assertion. This case, properly understood, and as applied by a long line of recent authorities, cannot be cited as an authority for the proposition that equity will not interfere with a seeming attempt to enforce the criminal law, but which is, in fact, a continuous trespass."

It will be observed that this is not a case where an officer of the law is attempting to enforce a void ordinance or statute to the great and irreparable injury of plaintiff, which, by the way, is the only possible ground for equitable interference, in that class of cases as a careful examination of the authorities will disclose. Nor is this a case where the right to enjoin a contemplated action is resisted on the ground that such act if committed would be a violation of the criminal law. The question here is: Can equity enjoin a criminal prosecution under a valid statute where such prosecution takes the form of persecution and the evident attempt of the police authorities is to force a person to submit to their construction of the law, whatever courts or juries may decide, or adopt means for the enforcement of any particular law, which are in no sense justifiable, but are adopted to deprive the defendant of certain civil rights, or simply because, as in the princi-

pal case, the officers of the law are assured of the support of local public opinion.

After carefully sifting the decisions we have been able to find very few authorities which discuss this particular question, but the result of our research is that the court in the principal case, although citing no authorities, has stumbled upon a rule that has a sound basis in principle. Not, however, on the ground of a "continuous trespass" for the action of the police in the principal case was a repeated, not a continuous trespass, but on the ground that the attempted prosecution was purely vexatious and a misapplication of the law resulting in injury to the plaintiff's property rights.

This was the reason given in *Atlanta v. Gas Light Co.*, 71 Ga. 106, where defendant was threatened with the arrest of all employees who attempted to lay pipes on the streets of Atlanta, in alleged violation of an ordinance preventing the wanton and unauthorized tearing up of the streets. The prosecutions were purely vexatious and intended to affect certain civil rights of the complainant. The court said: "That said persons as may be put on trial can successfully defend themselves, the complainant doubts not. But that is not a matter with which complainant has any concern. But the prevention of said employees from distributing said mains and laying them in their proper places, by any arrest, will be a trespass upon the rights of this complainant, guaranteed by its charter. . . . Where it is manifest that a prosecution and arrest is threatened for an alleged violation of city ordinances for the sole purpose of preventing the exercise of civil rights conferred directly by law, injunction is a proper remedy to prevent injury to the party thus menaced." To same effect: *Shinkle v. Covington*, 83 Ky. 420, loc. cit. 430. So also in *Yellowstone Kit v. Wood*, 18 Tex. Civ. App. 683, 43 S. W. 1068, the court specifies as one of the exceptions to the rule that equity will not enjoin a criminal proceeding: "To prevent repeated prosecutions, *wrongfully instituted*, for the purpose of vexing or harassing the defendant therein."

NOTES OF IMPORTANT DECISIONS

LIFE INSURANCE—POWER OF STATE TO DETERMINE FORM AND PROVISIONS OF LIFE INSURANCE POLICIES.—In 1907 Massachusetts which has always taken front rank in the strict regulation of life insurance, passed a law giving the insurance commissioner of the state the power to judge of the sufficiency of the forms of life insurance policies to be issued in the state of Massachusetts using as standards of form certain substantive provisions declared by the legislature.

In the case of *New York Life Insurance Company v. Hardison, Ins. Comr.*, 85 N. E. 410, the constitutionality of this act was upheld under the police power and under the power to regulate corporations. The court said:

"The insurance commissioner is an administrative officer. The legislature prescribed the requirements in the forms of policies. It did not see fit to prescribe a standard form for life insurance companies, but stopped with an enactment of substantive provisions for all policies. It was proper to leave to the insurance commissioner the management of details in the administration of the law. It was proper to prohibit the use of policies that did not conform to the law, and to punish disobedience on the part of an insurance company. It was a reasonable regulation to require companies to submit the forms of policies to the insurance commissioner before using them, so that he could see whether the law was being obeyed. His duty was to approve of every form of policy that seemed to him correct. The insurance companies, after submitting their forms to him, had nothing to do but to go on with their business, unless he made objection within thirty days. If he made such objection, they were given a right to bring a suit in this court for the determination of the question whether their proposed action was within the law. With the power of regulation of the business of insurance, and of the conduct of corporations, domestic and foreign, belonging to the legislature, it seems to us that such companies may be forbidden to issue policies that are deemed contrary to law by an administrative officer, until the court can determine the legal questions involved. The insurance commissioner cannot decide finally, nor exercise any judicial power in the premises. In these cases, the companies failed to satisfy an administrative officer, acting for the protection of the public, that they were proceeding legally. The statute declares that thereupon, they shall do no more business until there is a judicial determination of their rights by this

court. This part of the case is covered by the decision in *Provident Savings, etc., Society v. Cutting*, 181 Mass. 261, 63 N. E. 433, 92 Am. St. Rep. 415, and there are many other cases in which authority somewhat like this is held to have been rightly exercised by public officers. *Insurance Company v. Wilder*, 40 Kan. 561, 20 Pac. 265; *State ex rel. v. Moore*, 42 Ohio St. 103; *Brodline v. Revere*, 182 Mass. 598, 66 N. E. 607; *Com. v. Sisson*, 189 Mass. 247, 75 N. E. 619, 1 L. R. A. (N. S.) 752, 109 Am. St. Rep. 630."

The right of the legislature to prescribe a standard form of policy has been assumed in many cases. *Quinn v. Fire Association*, 180 Mass. 560, 62 N. E. 980; *Hewins v. London Assurance Company*, 184 Mass. 177-183, 68 N. E. 62; *Boyden v. Massachusetts Masonic Association*, 167 Mass. 242, 45 N. E. 735; *Quinlan v. Providence, etc., Insurance Company*, 133 N. Y. 356-365, 31 N. E. 31, 28 Am. St. Rep. 645; *King v. Concordia Fire Insurance Company*, 140 Mich. 258, 103 N. W. 616; *Dowling v. Lancashire Fire Insurance Company*, 92 Wis. 63, 65 N. W. 738, 31 L. R. A. 112; *Anderson v. Manchester Fire Insurance Company*, 59 Minn. 182, 60 N. W. 1095, 63 N. W. 241, 28 L. R. A. 609, 50 Am. St. Rep. 400; *O'Neill v. American Fire Insurance Company*, 166 Pa. 72, 30 Atl. 943, 26 L. R. A. 715, 45 Am. St. Rep. 650.

REGULATION OF RATES TO BE CHARGED BY PUBLIC SERVICE CORPORATIONS—I. MISCELLANEOUS ENTERPRISES AFFECTED WITH A PUBLIC INTEREST.*

In General.—In European countries the regulation of price was a very common practice in early times. And the power which concerned itself with this practice had no well defined limitation. But in this country,* the constitutions of our national government and of the several states, prescribe a limit to the exercise of such power.

Our natural and civil liberty to form business relations irrespective of state interference is one among the fundamental rights of American citizens. It is our right and liberty to determine the terms and conditions of the contract upon which our business relations are founded. As a general rule, a man has the right, and is free to ask and receive whatever price he chooses, or is able to obtain, for his goods or services. And he is under no obligation to sell his goods or services, unless he gets his own price. On the other hand,

*Part II. in next week's issue will discuss this same subject as affecting railroad companies exclusively.

no one else is entitled to, or has a right to his goods or services, unless such other person is willing to pay his price, even if the price is unreasonable. To this rule, however, there are some exceptions, which it is our purpose to consider in this article.

The right to demand and receive whatever price one pleases for his property or services, applies only to property or services which are of a private character. But when a business is in any way related to, or is rendered more valuable by special privileges or franchises conferred by the state, and which are not enjoyed by all persons alike, such business is looked upon in law as of a quasi-public character, and may be subjected to state regulation. And not only may a business be regulated which is in the nature of a franchise or special privilege, but the state claims and exercises the right to control a business which is "affected with a public interest." That is to say, when one devotes his property to a use in which the public has an interest, or uses it in a manner to make it of public consequence and affect the community at large, such property is for these reasons, deemed to be "clothed with a public interest," permitting its control or regulation by the state.

The clause usually embodied in our Bills of Rights, "that no person shall be deprived of property without due process of law," has never been construed by the courts of any state whose constitution has such a provision, as to deny the legislature power to make all needful rules and regulations respecting the use and enjoyment of property.¹ In the exercise of the powers of government it has been customary to regulate the conduct of its citizens one towards another, and the manner in which each shall use his own property, when such regulation becomes necessary for the public good. Not including those kinds of business over which the state exercises special control in the interest of peace, health, safety and morals, and which involve only the police power in the narrower sense of the term, it has been customary in England from time immemorial, and in this country from its first colonization, in the exercise of the power of government, to regulate public ferries,² mills,³ common carriers,⁴ innkeepers,⁵ bakers,⁶ hackmen⁷;

(1) *Munn v. People*, 69 Ill. 80.

(2) *Chenargo Bridge Co. v. Paige*, 83 N. Y. 179; *New York v. Starin*, 106 N. Y. 1; *Power v. Athens*, 99 N. Y. 592; *Spader v. N. Y. Elevated R. Co.*, 3 Abb. N. C. 467.

(3) *State v. Edwards*, 86 Me. 102; 15 Viner's Abr. 398, 399; *Cooley, Const. Lim.* 735.

(4) See Part II.

(5) *Russell v. White*, 41 Ark. 485; *Com. v. Mulse*, 38 Weekly Notes Cases, 328; *State v. Sumpter*, 53 Ark. 342; *People v. Pierson*, 59 Hun 450; *Albert v. Beaver*, 9 La. Ann. 64; *Lord v. Jones*, 24 Me. 439.

(6) *Mobile v. Yuille*, 3 Ala. 140.

(7) *Parmelle v. McNulty*, 19 Ill. 556; *Bennett v. Dutton*, 10 N. H. 481.

besides such things as the use of money;⁸ and in so doing to fix a maximum of charge to be made for services rendered, accommodations furnished, and articles sold or hypothecated.⁹

In searching for the principle upon which the power to regulate property rests reference is made to the common law. Lord Chief Justice Hale, said more than two centuries ago, that when property is "affected with a public interest it ceases to be *juris privati*."¹⁰ This has been accepted without objection as an essential element in the law of property ever since. Property becomes clothed with a "public interest" when used in a manner to make it of public consequence, and affect the public generally. When an individual devotes his property to a use in which the public has an interest, the law regards him as granting to the public an interest in that use, and as a result, he must submit to be controlled by the public for the common good to the extent of the interest he has thus created. He may withdraw his grant by discontinuing the use; but so long as he maintains the use, he must submit to the control of the public.¹¹

The power of the legislature to control public service corporations is subject to the constitutional limitations designed to protect persons against oppressive action by a state amounting to a deprivation of their property without compensation, or without due process of law.¹² But the legislative regulation of a business carried on under special privileges, or affected with a public

interest is not a taking of property within the meaning of the constitution, even where it reduces the profits realized from such business, unless it amounts to a virtual confiscation.¹³

Private Property—Power to Regulate Does Not Depend on Legal Monopoly.—It must be conceded that the uses to which a man may devote his property, the price which he may charge for such use, how much he shall demand or receive for his labor, and the methods of conducting his business are, as a general rule, not the subject of legislative regulation. These are a part of his liberty, of which, under the constitutional guaranty, he cannot be deprived. The merchant and manufacturer, the artisan and laborer, under our system of government, are left to pursue and provide for their own interests in their own way, untrammelled by burdensome and restrictive legislation which, however, common in rude and irregular times, is inconsistent with constitutional liberty.¹⁴ "There is no doubt," said Lord Ellenborough, "that the general principle is favored, both in law and justice, that every man may fix what price he pleases upon his own property or the use of it; but if, for a particular purpose, the public have a right to resort to his premises and make use of them, and he have a monopoly in them for that purpose, if he will take the benefit of that monopoly, he must, as an equivalent, perform the duty attached to it on reasonable terms."¹⁵ The power of the legislature, however, to regulate charges for the use of property and the rendition of services connected with it, does not depend in every case upon the circumstance that the owner of the property has a legal monopoly or privilege to use the property for the particular purpose. Private property "affected by a public interest" cannot justly be restricted as meaning only property clothed with a public character by special grant or charter of the state. The control which, by common law and statute, is exercised over common carriers is conclusive upon the point that the right of the legislature to regulate the charges for services in connection with the use of property, does not, in every case, depend upon the question of legal monopoly. And this is true of the control exercised over such matters as the interest on money, hackmen, ferrymen, innkeepers and wharfingers.¹⁶ The right of public regulation in these cases cannot be placed upon the ground of special privileges conferred by the public on those affected. The underlying principle is, that business of certain kinds holds such a peculiar re-

(8) See Tiedeman, *Lim. Police Power*, sec. 94.

(9) "To this day statutes are to be found in many of the states upon some or all of these subjects, and it has never been successfully contended that they come within any of the constitutional prohibitions against interference with private property." *Munn v. Illinois*, 94 U. S. 113. See generally on the subject of regulating prices; *Ames v. R. R. Co.*, 64 Fed. Rep. 165; *Chicago, etc. R. Co. v. Becher*, 32 Fed. Rep. 849; *Smith v. R. R. Co.*, 114 Mich. 460; *Cooley*, Const. Law, 234.

(10) *De Portibus Maris*, 1 Harg. Law Tracts, 78.

(11) *People v. Budd*, 117 N. Y. 1; *Munn v. People*, 69 Ill. 80; same, 94 U. S. 113; *Budd v. State*, 143 U. S. 517; *Allnut v. Ingles*, 12 East 527; *Lake Shore, etc. R. Co. v. R. R. Co.*; 30 Ohio St. 604; *State v. Columbus Gas Co.*, 34 Ohio St. 572. See *Hockett v. State*, 105 Ind. 250; *N. J. S. N. Co. v. Bink*, 6 How. 344; *Sinking Fund Cases*, 99 U. S. 747. In *Munn v. People*, supra it was held that when a business or employment becomes a matter of such public interest or importance as to create a common charge or burden upon the citizen; or, in other words, when it became a practical monopoly, to which the citizen is compelled to resort, and by means of which a tribute can be exacted from the community, it is subject to regulation by the legislature. See *Sinking Fund Cases*, supra; 25 L. Ed. 511, to same effect.

(12) *Western Union Tel. Co. v. Myatt*, 98 Fed. Rep. 335.

(13) *Dillon v. R. R. Co.*, 43 N. Y. Supp. 320. See paragraph 16, Part II.

(14) *Budd v. State*, 143 U. S. 517.

(15) *Allnut v. Ingles*, 12 East. 527.

(16) *People v. Budd*, 117 N. Y. 1; *Budd v. State*, 143 U. S. 517.

lation to the public interest that there is superinduced upon it the right of public regulation.¹⁷

Fixing Compensation for Services Rendered, and for the Use of Property—Maximum Charges.—In countries where the common law prevails, it has been customary for a long time for the legislative department to declare what shall be a reasonable compensation for services rendered in the public employments, or for the use of property in which the public has an interest.¹⁸ Undoubtedly, in mere private contracts, relating to matters in which the public has no interest, what is reasonable must be ascertained judicially. But this is because the legislature has no control over such a contract. The common law rule, which requires the charge to be reasonable, is itself a regulation as to price. Without it the owner could make his rates at will, and compel the public to yield to his terms, or forego the use. But the law itself, as a rule of conduct, may be changed at the will of the legislators. Indeed, the great office of statutes is to remedy defects in the common law as they are developed, and to adapt it to the changes of time and circumstances. To limit the rate of charge for services rendered in a public employment, or for the use of property in which the public has an interest, is only changing a regulation which existed before, and establishes no new principle in the law.¹⁹

While the legislature may constitutionally declare what shall be a reasonable compensation for services rendered in the public employments, or for the use of property clothed with a public interest; or may fix a maximum, beyond which any charge would be unreasonable,²⁰ such power of limitation or

regulation is not without limit. It is not a power to destroy, or a power to compel the doing of services, or permitting the use of property, without reward. Neither is it a power to take private property for public use without just compensation or without due process of law.²¹ Legislation which prevents a fair and reasonable return, the rights of the public considered, for capital engaged in a legitimate enterprise, is held to be a taking of property within the meaning of the constitution.²²

Privileges and Franchises—Gas Companies.—As we have observed, the state may regulate charges where the business is one the following of which is not a matter of right, but is permitted by the state as a privilege or franchise, as in the case of turnpike companies,²³ the business of setting up lotteries, of giving shows, keeping billiard tables for hire, selling intoxicating drinks, the keeping of ferries and toll bridges.²⁴ And when, for the accommodation of the business, special privileges are given in the public streets,²⁵ or an exceptional use is allowed of public property or public easements, as in the case of hackmen, draymen, regulation of charges is within the power of the legislative department of the state. And this is true in those cases where exclusive privileges are granted to an individual or set of men, in consideration of some special return to

(17) *People v. Budd*, supra; *Spring Valley Water Works v. Schottler*, 110 U. S. 347.

(18) *Munn v. Illinois*, 94 U. S. 113; *Budd v. New York*, 143 U. S. 517; *C. B. & Q. R. Co. v. Iowa*, 94 U. S. 155; *Pelk v. R. R. Co.*, 94 U. S. 164; *C. M. & St. P. R. Co. v. Ackley*, 94 U. S. 179; *Stone v. Wisconsin*, 94 U. S. 181; *Dow v. Biedelman*, 125 U. S. 680.

(19) See *Dow v. Biedelman*, 125 U. S. 680; *Munn v. People*, 94 U. S. 113.

(20) In addition to the cases cited in the foregoing notes, see: *Winona & St. P. R. Co. v. Blake*, 94 U. S. 180; *Ruggles v. Illinois*, 108 U. S. 526; *Ill. Cent. R. R. Co. v. Illinois*, 108 U. S. 541; *Stone v. Farmer's L. & T. Co.*, 116 U. S. 347; *Stone v. R. R. Co.*, 116 U. S. 352; *Brass v. State*, 153 U. S. 391; *Bondholders v. Road Comrs. Fed. Cases*, No. 1, 625; *Tilly v. Savannah, F. & W. R. Co.*, 5 Fed. Rep. 641; *Spring Valley Water Works v. Bartlett*, 16 Fed. Rep. 615; *C. M. & St. P. R. Co. v. Becher*, 32 Fed. Rep. 849; *Lawrence v. R. R. Co.*, 94 U. S. 164; *So. Minn. R. Co. v. Coleman*, 94 U. S. 181; *State v. Gas Co.*, 34 Ohio St. 572; *Ruggles v. People*, 91 Ill. 256; *Nash v. Page*, 80 Ky. 539; *Webster Tel. Case*, 17 Neb. 126; *Hockett v. State*, 105 Ind. 250; *Cent. U. T. Co. v. State*, 106 Ind. 1; *Same v. State*, 118 Ind. 194; *Chesapeake & P. Tel. Co. v. Baltimore, etc. Tel. Co.*, 66 Md. 399; *Delaware, L. & W. R. Co. v. Cent., etc. Co.*, 45 N. J. Eq. 50; *Wabash, St.*

L. & P. R. Co. v. Illinois, 118 U. S. 557; *Georgia R. & etc. Co. v. Smith*, 128 U. S. 174; *Zanesville v. Zanesville Gas, etc. Co.*, 47 Ohio St. 1; *Clyde v. R. R. Co.*, 57 Fed. Rep. 436; *Huldepfer v. Duncan, Id.*; *Munn v. People*, 69 Ill. 80; *In re Annan*, 50 Hun. 413; *People v. Budd*, 117 N. Y. 1; *State v. Brass*, 2 N. H. 482; *Sinking Fund Cases*, 99 U. S. 700; *Spring Valley Water Works v. Schottler*, 110 U. S. 347; *Lake Shore & M. S. R. Co. v. Cinn.*, 30 Ohio St. 604; *Davis v. State*, 68 Ala. 58; *Baker v. State*, 54 Wis. 368; *Girard Pt. Storage Co. v. Southwark Co.*, 105 Pa. St. 248; *Sawyer v. Davis*, 136 Mass. 239; *Brechbill v. Randall*, 102 Ind. 258; *Stone v. R. R. Co.*, 62 Miss. 607.

(21) *Dow v. Biedelman*, 125 U. S. 680.

(22) *Georgia R. & Bkg. Co. v. Smith*, 128 U. S. 174; *Cotting v. Kan. City Stk. Yds. Co.*, 79 Fed. Rep. 679. To enable the court to determine what is a reasonable return for the use of property, it must have before it all the facts relating to the particular business. The actual present value of its property, and not its cost, is to be taken as the basis. *San Diego, etc. Co. v. Jasper*, 89 Fed. Rep. 274; *Smyth v. Smyth*, 171 U. S. 361; *Smyth v. Higginson*, 169 U. S. 466. See *Merritt v. Knife Fall Co.*, 34 Minn. 245; *Stimson v. Muskegan Co.*, 100 Mich. 347; *The Ann Ryan, Fed. Cases*, No. 428; *The John M. Welch, Fed. Cases*, No. 7,357; *Smyth v. Ames*, 169 U. S. 466; *San Diego, etc. Co. v. City, etc.*, 74 Fed. Rep. 79; *St. L. San Fran. R. Co. v. Gill*, 156 U. S. 649; *Covington Turnp. Co. v. Sanford*, 164 U. S. 578; *Wellman v. R. R. Co.*, 83 Mich. 593.

(23) Paragraph 8.

(24) See Paragraph 8.

(25) See *Jameson v. Gas Co.*, 128 Ind. 555; *Townsend v. State*, 47 N. E. Rep. Ind. 19.

the public, or in order to secure something to the public not otherwise obtainable.²⁶

The business of supplying illuminating and fuel gas is held to be one of a public nature, the purpose of which is to meet a public necessity. Unlike ordinary corporations engaged in the manufacture and sale of articles that may be furnished by individuals, this business requires for its successful prosecution franchises and privileges which only the state, or one of its municipal agencies, can bestow upon it. It must be empowered to dig up the streets and highways where it operates and be permitted to lay its pipes and mains therein for the distribution of gas to the public.²⁷ It has, for these reasons been generally held that gas companies are public, or quasi-public corporations,²⁸ though there are to be found authorities to the effect that they are private corporations.²⁹

In granting exclusive franchises and privileges to gas companies, the state does not part with its right to protect the public health, safety or morals, which may be affected by the companies' relations with the public. The state may establish and enforce regulations not inconsistent with the company's charter rights for the protection of the public against dangers arising from these sources.³⁰ The state, or one of its municipal agencies, may impose upon gas companies a reasonable rate as a maximum charge for gas, unless restrained by some condition, express or implied, in the charters of the companies, which amounts to a contract.³¹

(26) See Turnpike Companies, Telephone Telegraph Irrigation and Railroad Companies.

(27) *N. Orleans Gas Co. v. Light Co.*, 115 U. S. 650; *Louisville Gas Co. v. Gas Co.*, 115 U. S. 683; *Gibbs v. Gas Co.*, 130 U. S. 396; *Chicago Gas Co. v. Gas and Light Co.*, 121 Ill. 530; *Westerfield Gas Co. v. Mendenhall*, 142 Ind. 545; *Newport v. Light Co.*, 84 Ky. 166; *Crescent City Gaslight Co. v. New Orleans Co.*, 27 La. Ann. 138; *Williams v. Gas Co.*, 52 Mich. 499; *State v. Trenton*, 36 N. J. Law 79; *Brooklyn v. Jourdan*, 7 Abb. Pr. N. C. 23; *State v. Gas Co.*, 18 Ohio St. 262.

(28) *Portland Nat. Gas Co. v. State*, 135 Ind. 54; *William v. Gas Co.*, 52 Mich. 499; *Gaslight Co. v. Clapply*, 26 N. Y. Sup. 287; *Pittsburgh's Appeal*, 123 Pa. St. 374; *Shepard v. Gas Co.*, 6 Wis. 539.

(29) *McCune v. Norwich City Gas Co.*, 30 Conn. 521; *St. Louis v. Gaslight Co.*, 70 Mo. 69. See *Commonwealth v. Gaslight Co.*, 12 Allen 75.

(30) *N. Orleans Gas Co. v. Light Co.*, 115 U. S. 650; *Louisville Gas Co. v. Gas Co.*, 115 U. S. 683; *Jameson v. Gas Co.*, 128 Ind. 555; *State v. Gaslight Co.*, 34 Ohio St. 572.

(31) *Capital City Gas Co. v. Des Moines*, 72 Fed. Rep. 818, 829; *Logansport etc. Gas Co. v. Penn.* 89 Fed. Rep. 185; *New Memphis Gas Co. v. Memphis*, 72 Fed. Rep. 952; *Thistlewaite v. State*, 149 Ind. 319; *Sharp v. South Omaha*, 53 Neb. 700; *Bath Gaslight Co. v. Clapply*, 26 N. Y. 287; *State v. Gaslight Co.*, 34 Ohio St. 572; *Zanesville v. Gaslight Co.*, 37 Ohio St. 45; *Toledo v. Gas Co.*, 5 Ohio Cir. Ct., 557; *Ohio Oil Co. v. Indiana*, 177 U. S. 190; *Zanesville v. Gas Co.*, 47 Ohio St. 1; *State v. Ohio Oil Co.*, 150 Ind. 21.

Elevators and Warehouses.—The business of elevating grain is charged with a public interest, and those who carry it on occupy a relation to the community analogous to that of common carriers, and may be controlled by legislation for the common good.³² A law, therefore, regulating the fees for elevating and discharging grain by elevators is not contrary to the constitutional guaranty against the taking of the citizen's property without due process of law.³³ Nor is it a denial of the equal protection of the laws, in addition to prescribing the maximum rate of charge, to require the grain stored in such elevators to be insured at the expense of the warehousemen, even though such law is applied to the owners of elevators whose principal business is that of storing their own grain, the storing of grain for others being a mere incident in their business.³⁴ Such a requirement, however, is not applicable to elevators built by persons only for the purpose of storing their own grain, and not to receive and store the grain of others.³⁵

All persons who engage in the business of keeping a warehouse may be required to procure a license;³⁶ and, in addition to this the legislature may provide for the inspection of the warehousing of grain and enforce its regulations with penalties.³⁷

Stock Yards Companies.—The business of stock yards companies is of such a public nature as to justify the legislature in imposing rules and regulations for their government. A statute,

(32) *Girard Pt. Storage Co. v. Southwark Foundry Co.*, 105 Pa. St. 248. See *Sawyer v. Davis*, 136 Mass. 239; *Brechbill v. Randall*, 102 Ind. 528; *Webster Tel. Case*, 17 Neb. 126; *Stone v. R. R. Co.*, 62 Miss. 607; *Hockett v. State*, 105 Ind. 250; *Sanford v. R. R. Co.*, 24 Penn. 381; *People v. Budd*, 117 N. Y. 1; *State v. Perry*, 5 Jones, 252; *Com. v. Duncan*, 98 Mass. 1; *Murray v. Hoboken Co.*, 18 How. 272; *Davis v. State*, 44 Am. St. Rep. 132; *Millett v. People*, 57 Am. Rep. 873; *People v. Budd*, 143 U. S. 517.

(33) *Budd v. State*, 143 U. S. 517, collecting cases. The business of elevating grain is so affected with a public interest that a law fixing the maximum charge for receiving, weighing and discharging grain is within the police power of the state. *People v. Budd*, 117 N. Y. 1; *In re Annan*, 50 Hun. 413; *State v. Brass*, 52 N. W. Rep. 408. This is true where the owners of elevators derive no special privileges from the state, but were, as citizens of the state, exercising the business of storing and handling grain for individuals. *Ruggles v. People*, 91 Ill. 256.

(34) *Brass v. State*, 153 U. S. 391; same, 52 N. W. Rep. 408.

(35) *Brass v. Stoester*, 153 U. S. 391.

(36) *Munn v. Illinois*, 94 U. S. 113; *Munn v. People*, 69 Ill. 80. See *Budd v. State*, 143 U. S. 517.

(37) *Baker v. State*, 54 Wis. 368. Tobacco warehousemen may be regulated. *Nash v. Page*, 80 Ky. 539.

therefore, prescribing the maximum charges to be made by such companies, which allows a certain income annually on the actual value of the property used for such purposes, or of a certain per cent on the capitalized value of the property and business, is within the competency of the legislature. This is true even though such law reduces the previous net income nearly fifty per cent.³⁸ But legislation which prevents a fair and reasonable return, the rights of the public considered, for capital engaged in a legitimate business, is in conflict with constitutional provisions designed for the protection of property, and is invalid.³⁹ But to enable a court to determine what is fair and reasonable, it must have before it all the facts, such as the cost, the present value of the property, the receipts and expenditures, and the manner of conducting the business; and the court will, when it deems it necessary, hear proof as to these matters for the purpose of determining whether a certain per cent on the capital stock of the company is a fair and reasonable return on the investment.⁴⁰

A law regulating stock yards companies is not objectionable as class legislation, because it applies only to such companies, if it is uniform in its operation on all companies of that class.⁴¹

Water and Irrigating Companies.—It is within the power of the government to regulate the prices at which water shall be sold by one who enjoys a virtual monopoly of the sale.⁴² But while the state possesses this right, the individual or corporation who engages in this business is within the protection of the guaranty afforded by the paramount provision of the Fourteenth Amendment to the federal constitution. They cannot be deprived of their property without just compensation, and it is the duty of the courts to annul rates so established when found

to be unreasonable and unjust.⁴³ In determining what is a fair rate to be charged by water companies, which will allow a fair return on their investment, the actual present value of the property, and not its cost, is to be taken as the basis upon which to compute the rate.⁴⁴ If the rates are fixed so low that they will not admit of the company's earning such compensation as, under the circumstances of the case, is just to it and to its consumers, the effect will be to deprive the company of its property, and to deny to it the equal protection of the laws.⁴⁵

Turnpike Companies.—The laying off, regulating and keeping in repair, of roads, highways, bridges and ferries, for the public use and convenience is the exercise of an authority which belongs to the state.⁴⁶ If the right to erect them is given to a private individual or corporation, it is given as a public franchise. Those who have been favored with such franchise or privileges are regarded as agents of the public. Their works are public and subject to public regulation, and the entire public has the right to use them.⁴⁷ But while the public has the undoubted right to resort to these highways for travel, the owners or operators thereof may demand and receive reasonable tolls as a consideration for such use. The right to receive tolls from the public, however, under these circumstances is not a common right, but is a franchise which belongs to the state, and a grant of such franchise, in some form or other, is necessary before a person or

(38) *Cotting v. Kansas City Stock Yds. Co.*, 82 Fed. Rep. 839, 850. In this case it was held that a law which allows 5.3 per cent annually on the actual value of the property used for stock yards purposes, or of 4.6 per cent on the capitalized value of the property and business, is valid.

(39) *Cotting v. Kansas City Stock Yds. Co.* supra. It was further held in this case that a law regulating public stock yards, which limits the charge for yardage to one charge, and prevents the owners of dead stock from disposing of it as he pleases, is constitutional. See *Smyth v. Smyth*, 171 U. S. 361; *Smyth v. Higginson*, 169 U. S. 466; *San Diego Land Co. v. Jasper*, 89 Fed. Rep. 274; *Smyth v. Ames*, 169 U. S. 466; *San Diego, etc. Co. v. City, etc.* 74 Fed. Rep. 79; *St. L. San Fran. R. Co. v. Gill*, 156 U. S. 649; *Wellman v. R. R. Co.*, 83 Mich. 593; *Covington Turnp. Co. v. Sanford*, 164 U. S. 578.

(40) *Cotting v. Kansas City Stock Yards Co.* supra.

(41) *Cotting v. Kansas City Stock Yards Co.* supra.

(42) *Spring Valley Water Works v. Schottler*, 110 U. S. 347; *Same v. Bartlett*, 16 Fed. Rep. 615.

(43) *San Diego Land etc. Co. v. Jasper*, 89 Fed. Rep. 274; *Water Co. v. City*, 117 Iowa 250; 91 N. W. Rep. 81; *Spring Valley Co. v. City*, 124 Fed. 574; see *Stanislaus Co. v. Irrigation Co.*, 192 U. S. 201.

(44) *San Diego, etc. Co. v. City*, 74 Fed. Rep. 79; *San Diego, etc. Co. v. Jasper* supra. See *Smyth v. Smyth*, 171 U. S. 361; *Smyth v. Ames*, 169 U. S. 466; *Cotting v. Stock Yards Co.*, 82 Fed. Rep. 850; *City v. Spring Valley, etc. Co.*, 53 Cal. 608. In the latter case it was held that to establish water rates in San Francisco is unconstitutional in so far as the fixing of rates therein differs from the mode prescribed by general law for other corporations.

(45) *San Joaquin, etc. Co. v. Stanislaus Co.*, 90 Fed. Rep. 516; *Water Co. v. City*, 117 Iowa 250; 91 N. W. Rep. 1081. See *Covington Turnp. Co. v. Sandford*, 164 U. S. 578; *St. L. San. Fran. R. Co. v. Gill*, 156 U. S. 649.

(46) *Young, et al v. Harrison*, 6 Ga. 130.

(47) *Comr's. v. Chandler*, 96 U. S. 205; *Olcott v. Supervisors*, 83 U. S. 678; *Commonwealth v. Wilkinson*, 16 Pick. 175; 26 Am. Dec. 654. See *Murray v. Berkshire Co.*, 12 Met. 455; *Newberry Turnp. Co. v. Eastern R. Co.*, 23 Pick. 327. The property of a turnpike company is affected with a public use. The corporate nature of such companies is essentially public, and the rule is that their charters are not protected from legislative interference unless the state has, in clear language indicated a deliberate purpose not to interfere in all time to come. *Winchester Turnp. Co. v. Croxton*, 98 Ky. 739; 34 S. W. Rep. 519; *Covington Turnp. Co. v. Sanford*, 164 U. S. 578.

company is authorized to make this exaction from the public.⁴⁸ The right to take tolls is granted as a compensation to the owners or operators for erecting the work and thus relieving the public treasury from this burden. Such owners or operators have a private interest in the tolls collected, but they are regarded as agents of the public. The works are public, and are subject to public regulation.⁴⁹ The public therefore, through its legislative department, may regulate the charges to be made by such operators for the use of their property and franchises, and in so doing, may prescribe a reasonable maximum beyond which any charge would be unlawful.⁵⁰ A corporation, however, invested by its charter with authority to construct and maintain a turnpike road, and to collect tolls agreeable to certain named rates, cannot be required by a subsequent law to conform to a tariff of rates that is unreasonable and which prevents it, out of its receipts, from earning dividends for its stockholders, or maintaining its road in proper condition for travel.⁵¹ But the mere reduction of toll charges will not be regarded as a taking of property without due process of law, when it cannot be assumed that the earnings of the company will be decreased to such extent as to amount to a confiscation of the business.⁵²

The state may authorize the appointment of inspectors, on the application of turnpike companies, for the purpose of ascertaining the fact as to whether the road is completed so as to warrant the charging of tolls.⁵³ But it cannot, when it authorizes a company to construct a turnpike and erect the necessary and proper toll

gates, compel the company to remove such structures, when there has been no reservation made in the charter of authority to act in this manner. A law enacted for that purpose would be unconstitutional as a taking of property within the meaning of the constitution.⁵⁴

Telegraph and Telephone Companies.—A telegraph company is a public agency, and is subject to public regulation and control.⁵⁵ But such companies are not common carriers, nor subject to the extraordinary responsibilities of a common carrier.⁵⁶ They are engaged in a business "affected with a public interest," within the principle which authorizes the state to regulate their charges, and the legislature may provide a maximum rate which their charges shall not exceed.⁵⁷ The state may regulate the management of their property, provide for the proper conduct of their business, and require from them the payment of a reasonable tax.⁵⁸ The fact that they are the instruments of interstate commerce,

(54) *Atty. General v. Turnp. Co.*, 55 Pa. St. 466.

(55) *W. U. Tel. Co. v. Carew*, 15 Mich. 525; *N. Y. Tel. Co. v. Dryburg*, 35 Pa. St. 302; *W. U. Tel. Co. v. Bartlett*, 62 Me. 217; *Wann v. W. U. Tel. Co.*, 37 Mo. 481; *Tyler v. W. U. Tel. Co.*, 74 Ill. 168; *Passmore v. W. U. Tel. Co.*, 78 Pa. St. 242; *Ellis v. Am. T. Co.*, 13 Allen 226; *Fowler v. W. U. Tel. Co.*, 80 Me. 381.

(56) *Parsons on Contract*, Vol. 2, P. 281; *Gillis v. W. U. Tel. Co.*, 61 Vt. 461; *W. U. Tel. Co. v. Reynolds*, 77 Va. 173; *Binny v. R. R. Co.*, 18 Md. 341; *N. Y. Etc. Co. v. Dryburg*, 35 Pa. St. 298; *Shields v. Washington, etc. Co.*, 11 Am. L. T. 311; *W. U. Tel. Co. v. Ward*, 23 Ind. 377; *W. U. Tel. Co. v. Carew*, 15 Mich. 525; *Ellis v. Am. T. Co.*, 13 Allen 226; *U. S. Tel. Co. v. Gilderslieve*, 29 Md. 232; *Baldwin v. U. S. Tel. Co.*, 45 N. Y. 744; *Leonard v. N. Y. etc., Co.*, 41 N. Y. 544; *Passmore v. W. U. Tel. Co.*, 78 Pa. St. 238; *Bryant v. Am. Tel. Co.*, 1 Daly 575; *De Rutte v. N. Y. Tel. Co.*, 30 How. Pr. 403; *Wann v. W. U. Tel. Co.*, 37 Mo. 472; *Wash. Tel. Co. v. Hobson*, 15 Gratt 122; *Bartlett v. W. U. Tel. Co.*, 62 Me. 209; *W. U. Tel. Co. v. Fontaine*, 58 Ga. 433; *Camp v. W. U. Tel. Co.*, 1 Met. Ky. 164; *Alken v. Tel. Co.*, 5 S. C. 358; *Fowler v. W. U. Tel. Co.*, 80 Me. 381; *W. U. Tel. Co. v. Munford*, 187 Tenn. 190; *Breese v. U. S. Tel. Co.*, 45 Barb. 274. Contra, see: *Parks v. A. C. Tel. Co.*, 13 Cal. 422; *McAndrews v. Electric Tel. Co.*, 17 Com. B. 3. Also see, *Dickson v. Renters Tel. Co.*, 3 Com. P. Div. 7; *Brown v. L. Erie Tel. Co.*, 1 Am. L. Reg. 685.

(57) *Chesapeake, etc. Tel. Co. v. Manning*, 186 U. S. 338; *C. & P. T. Co. v. B. & O. T. Co.*, 66 Md. 399; *Hockett v. State*, 105 Ind. 259; *R. R. Comr's. v. Western U. T. Co.*, 113 N. C. 213; *W. U. Tel. Co. v. Pendleton*, 122 U. S. 347. State commission may regulate the charges of telegraph companies. *State R. R. Com. v. W. U. Tel. Co.*, 113 N. C. 213; 22 L. R. A. 570.

(58) *Am. U. Tel. Co. v. W. U. Tel. Co.*, 67 Ala. 32; *Connell v. W. U. Tel. Co.*, 108 Mo. 459; *Am. R. T. Co. v. Hess*, 125 N. Y. 641; *W. U. Tel. Co. v. New York* 38 Fed. Rep. 552; *People v. Squire*, 145 U. S. 175; *Ellis v. Am. T. Co.*, 13 Allen 226; *Kemp v. W. U. Tel. Co.*, 28 Neb. 66.

(59) *W. U. Tel. Co. v. Pendleton*, 122 U. S. 347.

(48) *Comr's of Dodge v. Chandler*, 96 U. S. 205; *Wright v. Nagle* 101 U. S. 791. A turnpike road is one on which parties have by law a right to erect gates and bars, for the purpose of taking tolls, and of refusing the permission to pass to all persons who refuse to pay. *Northam Bridge & Road Co. v. Loudon, etc. Co.*, 6 M. & W. 428; 1 Ry. Cases, 665.

(49) *Comr's of Dodge v. Chandler*, *supra*. See 3 Kent Com. 458, 459; *Winchester Turnp. Co. v. Croxton*, 98 Ky. 739; *California v. Pacific R. Co.*, 127 U. S. 1, 40; *Olcott v. Supervisors*, 83 U. S. 678.

(50) *Covington Turnp. Co. v. Sanford*, 164 U. S. 578; *Winchester, etc. Turnp. Co. v. Croxton*, 98 Ky. 739; *Commonwealth v. Wilkinson*, 16 Pick. 175; *Covington Turnp. Co. v. Sanford*, 20 S. W. Rep. 1031. See *Hunter v. Turnp. Co.*, 56 Ind. 213; *Stimson v. Muskegon Co.*, 100 Mich. 347; 59 N. W. Rep. 142. In the latter case it was held that the power of the legislature to regulate tolls and fares to be charged by corporations which have devoted their property to a public use has been firmly settled in law.

(51) *Covington Turnp. Co. v. Sanford*, 164 U. S. 578.

(52) *Winchester & L. Turnp. Co. v. Croxton*, 98 Ky. 739. See *St. L. & San Fran. R. Co. v. Gill*, 156 U. S. 649.

(53) *Hunter v. Turnp. Co.*, 56 Ind. 213.

and exercise privileges under special grants of rights of way from the federal government, does not remove them from the state's power of control in matters of police regulation, though it may limit the power of the state in those instances where the charges relate to interstate messages.⁵⁰

As in the case of telegraph companies, telephone companies are public agencies, and cannot arbitrarily refuse to furnish their instruments to any person desiring them and offering to comply with their regulations.⁵⁰ The state may, in the exercise of its police power, regulate their charges and provide a reasonable maximum rate which they may be forbidden to disregard.⁶¹ The fact that the instruments or appliances used by them are patented,⁶² or that their lines extend beyond the limits of the state,⁶³ will not defeat the right of the state to make such provision. But this right of regulation pertains to the state alone, and has been denied to a municipal corporation. The state, however, may delegate its right of police regulation to a municipal corporation; but whether such a delegation has been made in any particular case, depends upon the construction of the statutes or the charter of incorporation.⁶⁴ It has been held that the power to determine what compensation a telephone company may exact for services to be rendered by it is a legislative and not a judicial function.⁶⁵ The regulation of its charges by the legislature is not regarded as an interference with its constitutional rights with respect to private property.⁶⁶ And when such regulations exist the company cannot evade its operation. It cannot, for example, exceed the maximum rate by pretending to divide the charge into two items, one being designed as the regular rental and the other as a monthly charge for the use of the instruments by non-subscribers.⁶⁷ Nor can it exceed the rate prescribed by attempting to

charge a certain sum for each conversation, instead of charging regular rental.⁶⁸

O. H. MYRICK.

Los Angeles, Cal.

(68) Cent. U. Tel. Co. v. State, 118 Ind. 194.

MASTER AND SERVANT—WHAT CONSTITUTES A SAFE "PLACE" TO WORK.

HAHN v. CONRIED METROPOLITAN OPERA CO.

Supreme Court of New York. Appellate Division, First Department, June 5, 1908.

A bridge used as a part of the scenery in a play was not a "place," within the rule which requires the master to furnish his employees with a safe place to work, but was rather an appliance, such as scaffolding used in the conduct of the work has been held to be.

SCOTT, J.: The defendant appeals from a judgment in favor of plaintiff entered upon a verdict. The defendant was lessee and manager of the Metropolitan Opera House in the city of New York, and the plaintiff was in its employ as a member of the chorus in the production of the opera "Carmen." The stage setting of the first act of this opera involves the use of what is apparently a bridge, over which a number of the members of the company, male and female, pass to and fro. This bridge was constructed upon plans designed by an employee of defendant described as the technical director, and is set up by the stage hands as required, remaining in position only during a single act. It consists of two platforms or tables, securely fastened to the floor of the stage, about 19 feet apart. Between these run three stringers, stiffened and strengthened by tension rods set up by turn-buckles. On top of the stringers are laid planks constituting the floor of the bridge. This structure is masked in front by painted work in order to present to the audience the appearance of a bridge. The plaintiff and some other members of the chorus were standing on this structure, and other members of the company representing soldiers were passing over it, when it collapsed and fell to the stage, carrying plaintiff with it. From this accident she received injuries for which she sues.

The plaintiff contented herself with proving the happening of the accident and the injur-

(60) State v. Bell Tel. Co., 36 Ohio St. 296; State v. Nebraska T. Co., 17 Neb. 126; Bell Tel. Co. v. Balt., 59 Am. Rep. 172, and note; State v. Bell Tel. Co., 10 Cent. Law Jr. 438; Louisville Trans. Co. v. Am. Dist. T. Co., 14 Chic. L. N. 15.

(61) Chesapeake, etc. T. Co. v. Manning, 186 U. 338; Hockett v. State, 105 Ind. 259; Cent. U. Tel. Co. v. Bradbury, 106 Ind. 1; Johnson v. State, 113 Ind. 143; Cent. U. Tel. Co. v. State, 118 Ind. 194; R. R. Com'rs. v. W. U. Tel. Co., 113 N. C. 213; Webster Tel. Case 17 Neb. 126; State v. Tel. Co., 46 Ohio St. 296.

(62) Hockett v. State, 105 Ind. 250. See Patterson v. Kentucky, 97 U. S. 507.

(63) Cent. U. T. Co. v. Fally, 118 Ind. 194.

(64) St. Louis v. Bell Tel. Co., 96 Mo. 623; 9 Am. St. Rep. 370.

(65) Nebraska Tel. Co. v. State, 76 N. W. Rep. 171; Peik v. R. R. Co., 94 U. S. 164.

(66) Hockett v. State, 105 Ind. 250.

(67) Johnson v. State, 113 Ind. 143; 21 Am. & Eng. Corp. Cases, 65.

ies received. The defendant assumed the burden of proving that the bridge was properly constructed. The bridge, as has been said, was constructed after the design of the technical director, who had been engaged in like business for many years, and had had experience in a number of important scenic productions. He described in detail the plan and method of such construction which it is not necessary to recapitulate here, because no evidence was produced tending to show any defect in design. It appeared without contradiction that the timber used in the construction was comparatively new, and at least new that season, and that it exhibited no visible defects. It also appeared that the bridge was designed to be of sufficient strength to hold 50 or 60 people, and that not more than 14 were on it when it broke down. A similar bridge had been frequently used in this and other operas without accident. When the bridge was set up by the stage hands, the several parts were bolted together. The mere happening of the accident certainly justifies the inference that there was some defect either in the design or construction of the bridge, or in the manner in which it was put together on the night on which the accident happened; but this is not enough to establish actionable negligence on the part of the defendant. The bridge was not a "place" within the rule which requires the master to furnish his employees with a safe place to work, but was rather an appliance, such as a scaffolding used in the conduct of the work has frequently been held to be. *Butler v. Townsend*, 126 N. Y. 105, 26 N. E. 1017; *Benzing v. Steinway*, 101 N. Y., 547, 5 N. E. 449; *Stringham v. Hilton*, 111 N. Y. 188, 18 N. E. 870, 1 L. R. A. 483; *Kimmer v. Weber*, 151 N. Y. 417, 45 N. E. 860, 56 Am. St. Rep. 630. The duty of the master with reference to such an appliance was fully performed when he had furnished competent and experienced persons to design and construct it, and a sufficient quantity of proper material with which to build it, and there is nothing in the case to justify an inference that the defendant had failed in either of these particulars. On the contrary, all the evidence upon the subject is to the contrary. If the collapse occurred from some careless omission on the part of the stage hands in bolting the structure together, as may have been the case, this was negligence of co-employees of the plaintiff, for which the defendant is not to be held liable, for this was a mere detail of the work, properly intrusted to plaintiff's fellow servants, for whose negligent performance the master is not responsible. *Kimmer v. Weber*, *supra*. The jury was properly instructed as to the

extent of the defendants' liability, but their verdict was plainly against the evidence in the case.

The judgment and order appealed from must therefore be reversed, and a new trial granted, with costs to the appellant to abide the result.

Clarke, J., concurs. Ingraham, J., concurs in result. Houghton and Laughlin, JJ., dissent.

NOTE.—What is a "Safe" Place to Work Which the Master is Required to Furnish.—The importance of the distinction between the place to work and the appliances to work with, which is so prominent in the law of master and servant, lies in the fact that a servant does not assume the risk of accidents and injuries due to the failure of the master to exercise reasonable care in furnishing him with a reasonably safe place to work, but does, on the other hand, assume the risk of such injuries as result from defective or dangerous machinery or appliances. 26 Cyc. pp. 1185, 1186. Of course, both of these co-relative rules of law have their important exceptions which, however we will not undertake to discuss in this annotation.

It is a rule of law, well settled by authority that it is the duty of a master to provide his employees with a suitable place in which to work with a reasonable degree of safety and without exposure to dangers not within the obvious scope of the business as usually carried on. *Smith v. Penninsular Car Works*, 60 Mich. 501; *Frye v. Gas Co.*, 94 Me. 17, 46 Atl. 402; *McDonnell v. Railroad Co.*, 105 Iowa, 459; *Saunders v. Brick Co.*, 63 N. J. L. 554, 76 Am. St. Rep. 222.

The following are instances which have been held to constitute "unsafe places to work" which rendered the master liable for injuries: *DePauw Co. v. Stubblefield*, 132 Ind. 182, 31 N. E. 535, (an opening in the floor 14 inches wide and three feet long covered by loose boards and pieces of iron which became displaced, causing injury); *Missouri Malleable Iron Co. v. Dillon*, 206 Ill. 145, 69 N. E. Rep. 12, (a hole or depression in the floor of a foundry which caused a truck of red-hot castings to be overturned upon plaintiff); *Angel v. Mining Co.*, 115 Ky. 728, 74 S. W. Rep. 714, (placing a case of dynamite near a furnace fire to thaw where plaintiff is required to look after the furnace and not the dynamite); *Nugent v. Cudahy Packing Co.*, 126 Iowa, 517, 102 N. W. Rep. 442, (a new concrete pier not sufficiently hardened, upon which plaintiff was assigned to work and which crumbled under a weight it was expected to bear); *Ferris v. Hérnsheim*, 51 La. Ann. 178, 24 So. Rep. 771, (staircases, the zinc covering on the treads of which was torn and jagged, causing plaintiff to stumble); *Fyre v. Electric Co.*, 94 Me. 17, 46 Atl. Rep. 804, (hole dug in front of boiler and left improperly covered, resulting in injury to fireman); *Hearn v. Quillen*, 94 Md. 39, 50 Atl. Rep. 402, (fall of roof in process of construction); *Johnson v. Bank*, 79 Wis. 414, 48 N. W. Rep. 712, 24 Am. St. Rep. 722, (fall of snow from roof of shed into which plaintiff was required to carry brick).

The following case will illustrate what is considered not to be an unsafe place to work. *Babcock Bros. Lumber Co. v. Johnson*, 120 Ga. 1030,

28 S. E. Rep. 438. The "place" in this case was an unfastened upright brace among the rafters intended as a means to support the roof which a servant sent to work on the ceiling suddenly caught to keep from falling. The lateral movement pulled the heavy brace out of place and fell with plaintiff to the floor. Brace was intended to support a perpendicular weight and therefore need not be fastened to resist a lateral force.

The "place" to work must be distinguished from the avenues of egress and ingress. Thus where a master sets his servant to work in a part of an unfinished building which is itself safe, but can be reached only by climbing a ladder through a dangerous hatchway, there is no violation of the master's duty to furnish a safe place to work, so as to render him liable for injuries received by the servant while climbing the ladder, as the ladder is not the servant's place to work, but only the means of reaching such place. *Evans v. Manufacturing Co.*, 25 N. Y. Supp. 509.

JETSAM AND FLOTSAM.

HOW TO EXPLAIN TO YOUR CLIENT WHY YOU LOST HIS CASE.

The following response at the Kentucky Bar Dinner in 1883 by the Hon. Byron Bacon, a distinguished member of the Louisville Bar, since deceased, is as good now as at that time. It is a gem worth reproducing, so we set it forth again:

"I deprecate the thought that I respond because, from a more extended experience than my legal brethren, I bring to the solution of this question the exhaustive learning and skill of the specialist. The characteristic modesty of our profession forbids that I should arrogate to myself to instruct the eminent lawyers around me, wherein they doubtless have attained that perfection which only long practice can give."

"I assume, therefore, that the subject was proposed for the edification of novitiates—those 'young gentlemen' to whom Blackstone so often and so feelingly alludes, who, after a long and laborious course of study, have been found, upon an examination by the sages of the law, not to have 'fought a duel with deadly weapons since the adoption of the present Constitution,' and have been admitted to our ranks. (1) To them, then, I shall offer briefly some suggestions upon this point, hoping that they may not find them of practical value upon the termination of their first case."

"The question, as framed, is not unlike that with which Charles II. long puzzled the Royal Society. He demanded the cause of certain phenomena, the existence of which he falsely assumed. The answer was simply the denial of the existence of the phenomena. What lawyer ever attempted to explain the loss of the case upon the hypothesis that he had lost it. That a lawyer can not lose a case is as well established a maxim as that 'the king can do no wrong,' or that 'the tenant can not deny his

(1) Before admission to the practice of law in Kentucky the applicant is required by the Constitution of that state to make oath that he, being a citizen thereof, has not fought a duel with deadly weapons with another citizen of the state.

landlord's title.' Eliminate this error and our question is of easy solution.

"Coke tells us that law is the 'perfection of human reason;' Burke, that it is 'the pride of the human intellect;' 'the collected reason of ages, combining the principles of eternal justice with the infinite variety of human concerns;' 'the most excellent, yea, the exactest of the sciences;' and the eloquent Hooker, that 'her seat is the bosom of God, her voice the harmony of the spheres; all things in heaven and on earth do her homage—the least as feeling her care, the greatest as not exempt from her power.' But we know that, if it be the purest of reason, the exactest of the sciences, its administration is not always intrusted to the severest of logicians or the exactest of scientists. We know that the great, the crowning glory of 'our noble English common law' is its uncertainty, and therein lies the emolument and pleasurable excitement of its practice. If, oblivious of this, you shall have assured your client of success in the simplest case, the hour of his disappointment will be that of your tribulation, and professional experience can extend to you no solace or aid.

"But your client's cause has resulted unfavorably. You, of course, are never to blame; the fault is that of the judge, the jury, or your client himself and it may be of all three. It becomes your duty to divert the tide of his wrath into those channels where it can do the least possible harm. If he be a crank and shoots the judge or cripples a juror they fall as blessed martyrs, and their places and their mantles are easily filled; but not so readily your place or your mantle. As one of America's sweetest poets, Mr. G. . . . M. D. . . . (2) has expressed it in a touching tribute to our professional and social worth, unequalled for delicacy of sentiment, boldness of imagery, and beauty of diction in the whole range of English poetry:

"Judges and juries may flourish or may fade,
A vote can make them as a vote has made;
But the bold barrister, a country's pride,
When once destroyed can never be supplied." (3)

"The selection then, of a target for your client (I use the word 'target' metaphorically) must rest upon the peculiar facts and circumstances of the case and the 'sound discretion,' as the venerated Story has it, of the counsel. But avoid, if possible, imputing the blame to your client, for although this has been attended with very happy results, yet his mood at such times is apt to be homicidal, and moreover, you should bear in mind that there your aim is to conciliate.

"'Who wrote that note,' demanded an Indiana lawyer, who, under the old system of procedure, had declared in covenant as on a writing obligatory and gone out of court on a variance.

"'I got Squire Brown to write it,' answered his sorely perplexed and discomfited client.

"'I thought so,' sneered the learned counsel. 'Didn't you know that no d— magistrate could write a promissory note that would fit a declaration.'

(2) A member of the Kentucky bar, who, unlike Sir William Blackstone, did not forsake the muses when he espoused the profession of which he is a distinguished ornament.

(3) A passage in "The Deserted Village" forcibly reminds us of these lines, yet we should be slow to charge the author of the "Vicar of Wakefield" with plagiarism.

"First, as to the jury. Upon this head I need not enlarge, only remind you that you are not held by the profession as committed or estopped by any eulogium, however glowing, which you may have pronounced during the progress of the trial on their intelligence or integrity. It is only in the capacity of a scapegoat that the American juror attains the full measure of his utility, and as such he will ever be regarded by our profession with gratitude not unmingled with affection.

"But it is to the judge that we turn in this extremity with unwavering confidence. The serenity and grandmotherly benignity enthroned upon his visage is to the layman that placidity of surface which indicates fathomless depths of legal lore; to the lawyer it bespeaks the phlegmatic temperament of one whose mission is to bear uncomplainingly the burdens of others.

"It comes upon you like a revelation, that your weeks of study, your elaborate preparation, your voluminous briefs are all for naught; that the impetuous torrent of your eloquence has dashed itself against his skull, only to envelope it in fog and mist, and more 'in sorrow than in anger' you confess that the presumption that every man knows the law can not be indulged in his favor. Even your luminous exposition has failed to enlighten him. You need not spare him. He thrives on abuse. Year in and year out he bears the anathemas of disappointed lawyers and litigants with the stolid indifference of Sancho Panza's ass in the valley of the pack-staves, or beneath the missiles of the galley-slaves, and society comes finally to regard him pretty much as did Sancho his ass. It berates him, overtakes him, half starves him and loves him.

"But seriously considered, our question is only a long-standing and harmless jest of the bar, meaningless in actual practice. The lawyer is untiring in his client's behalf, and the client knows—be the result what it may—that he has had the full measure of his lawyer's industry, zeal and ability, and requires no explanation.

"Lord Erskine said that in his maiden speech he felt his children tugging at his gown and heard them cry, 'Now, father, is the time for bread.' The British bar applauded the sentiment. The American lawyer throughout the case feels his client tugging at his gown, and if unsuccessful is sustained by the consciousness that he has done his whole duty as God has given him to see and perform it; and should he want further consolation, he can open that eldest of all the books of the law and there read these words, which may soothe his wounded spirit, and possibly best answer the question of to-night:

"I returned and saw under the sun that the race is not to the swift, nor the battle to the strong, neither yet bread to the wise, nor yet riches to men of understanding, nor yet favor to men of skill, but time and chance happeneth to them all."

that were subsequently to be made in the name of that little clause. The power thus conferred on Congress was recently declared by the United States Supreme Court to be "perhaps the most benign gift of the constitution," and no one at all conversant with the public questions of the day needs to be reminded of the commanding and growing importance of this provision. It seems, however, to have been but inadequately treated by text writers, and this want the author of the present work has attempted to supply. Particular attention has been given to statement of unifying principles, a comprehension of which is so necessary to an understanding of the many difficult questions involved. The book contains 3,000 citations of judicial decisions and reference is given not only to the Official Reports, but also to the Reporters, the Am. Decisions, Am. Reports, Am. State Reports and the Lawyers' Reports Annotated. One volume of 302 pages, and published by Baker, Voorhis & Co., New York.

HUMOR OF THE LAW.

A judge sat beside a woman in a Milwaukee car, whom he thought he knew, and venturing a remark that the day was pleasant, she replied:

"Yaw."

"Why for you wear a veil?" he asked.

"So I don't addract addention."

"Id is de province off shentlemen's do admire," he replied.

"Not when dhey pe married."

"But I'm nodt."

"Is dat so?"

"Oh, no, I'm a patchelor."

"Veil led me see," said the woman, removing her veil. "I am your mudder-in-law."

There were two prisoners in jail. One was in for stealing a cow; the other for stealing a watch. Exercising in the court-yard one morning the first prisoner said tauntingly to the other: "What time is it." "Milking time," was the retort.

"Have you fixed up my will just the way I told you?" asked the sick man, who was the possessor of many needy relatives and some well-to-do but grasping ones.

"I have," asserted the lawyer.

"Just as strong and tight as you can make it, eh?" asked his client.

The lawyer nodded.

"All right," said the sick man. "Now I want to ask you one thing—not professionally—who do you think stands the best chance of getting the property when I'm gone?"—Youth's Companion.

The following is a form of warrant issued in a Wisconsin justice court:

"State of Wisconsin vs. Albert G. Carpenter. Frank Hackett, J. P.

"That Albert G. Carpenter did go with the wife of the said James Carpenter on the above date to the deport in the village of North Freedom, and there purchase a ticket for Augusta Carpenter the wife of the said James Carpenter for her transportation to Winona, Minn., which has broke up his peace and happiness with his family."—Case and Comment.

BOOK REVIEWS.

COOKE ON THE COMMERCE CLAUSE.

The commerce clause of the federal constitution has been most prolific of litigation. Surely the framers of that little clause had little idea of the tremendous assumptions of power

WEEKLY DIGEST.

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1. **Accident Insurance**—Cause of Death.—The requirement of an accident policy that death must have resulted "necessarily and solely" from accidental injury is satisfied where the injury was the predominating and efficient cause of the death.—*Continental Casualty Co. v. Colvin, Kan.*, 95 Pac. Rep. 565.

2. **Adverse Possession**—Title by Public.—The public may acquire prescriptive rights, and such right of acquisition belongs to the commonwealth as well as to any municipal corporation or other public body or the individual members of the general public.—*Attorney General v. Ellis, Mass.*, 84 N. E. Rep. 430.

3. **Appeal and Error**—Appealable Order.—No appeal lies from an order granting or refusing to dissolve an injunction pendente lite, except where the injury cannot be repaired in damages.—*Wendling v. Dixie Ice Mfg. Co., La.*, 46 So. Rep. 205.

4. **Dismissal**—Where it is apparent on appeal that a bill in equity makes no case of which an equity has jurisdiction, it may order a dismissal of the bill, though its equity be not questioned by the pleadings or expressly presented.—*Micou v. McDonald, Fla.*, 46 So. Rep. 391.

5. **Special Verdict**—Counsel by their conduct held to have treated the issue of the abrogation of a contract as embraced in and determined by a special verdict, or as established by undisputed evidence, and not thereafter entitled to contend that such issue was not foreclosed by the special verdict.—*Maxon v. Gates, Wis.*, 116 N. W. Rep. 758.

6. **Bailment**—Negligence.—Where a bailee of money alleges that it was stolen from him, the fact that other money belonging to defendant

was stolen at the same time is not conclusive against the allegation of gross negligence.—*Pat-riska v. Kronk, Co.*, 109 N. Y. Supp. 1092.

7. **Bankruptcy**—Acts of Bankruptcy.—It is not an act of bankruptcy for which a firm may be adjudged a bankrupt that one of its members out of his individual estate prefers one of his own, or one of the firm's creditors.—*Mills v. J. H. Fisher & Co.*, U. S. C. C. of App., Sixth Circuit, 159 Fed. Rep. 897.

8. **Conditional Sale Contract**—The validity of a conditional sale contract by which title was reserved in the seller as against the trustee in bankruptcy of the purchaser depends upon the law of the state in which delivery of possession thereunder was made.—*Davis v. Crompton*, U. S. C. C. of App., Third Circuit, 158 Fed. Rep. 735.

9. **Consent**—An adverse claimant brought into a court of bankruptcy by citation and ordered to turn over property, and who before entry of final decree against him specially objects on the ground that the court is without jurisdiction, cannot be held to have consented to such jurisdiction.—*In re Horgan*, U. S. C. C. of App., First Circuit, 158 Fed. Rep. 774.

10. **Duty to Surrender Preferences**—A bankrupt's creditor, having received a preference not intended to be such, may retain the preference and prove his claim.—*Lynch v. Bronson*, Conn., 69 Atl. Rep. 538.

11. **Pleadings**—Where a trustee in bankruptcy seeks to recover the property of the bankrupt in an action which the bankrupt might have prosecuted but for the bankruptcy, he is not required to allege that he has not sufficient assets in his hands to pay all liabilities.—*Drew v. Myers*, Neb., 116 N. W. Rep. 781.

12. **Banks and Banking**—Competency of Depositor.—A bank may pay money to a depositor, and is not bound to guard against any misuse to which he may put the money, in the absence of information as to his incapacity.—*Reed v. Mattapan Deposit & Trust Co.*, Mass., 84 N. E. Rep. 469.

13. **Brokers**—Pledge of Stock.—A stockbroker buying stock for a customer who deposits a specified sum as margin, held a pledgee of the stock, and a sale thereof without demand or notice is a conversion.—*Clappe v. Taylor*, 109 N. Y. Supp. 1072.

14. **Carriers**—Negligence.—In an action against a railroad company for personal injuries, an instruction to find for defendant if plaintiff was negligent held properly refused for failing to require that such negligence tract.—A city ordinance requiring payment of should have been the proximate cause of the injury.—*Atlanta & B. Air Line Ry. v. Wheeler*, Ala., 46 So. Rep. 262.

15. **Constitutional Law**—Obligation of Con-water rates into the city's general fund, and providing for the payment of water bonds by specific appropriations, held not invalid as impairing the obligation of the bondholders' contract with the city.—*Sinclair v. Brightman*, Mass., 84 N. E. Rep. 453.

16. **Contracts**—Action for Breach.—In an action for breach of contract, if no cause of action is alleged, no damages can be recovered, and a demurrer to the declaration on the ground that it does not appear that plaintiff has sustained any damage will be sustained.—*Hall v. Northern & Southern Co.*, Fla., 46 So. Rep. 178.

17. **Inevitable Accident**—Where a party voluntarily undertakes to do a thing, performance is not excused because by inevitable accident or other contingency performance becomes

Impossible.—*Marsh v. Johnson*, 109 N. Y. Supp. 1106.

18.—Unpaid Stock Subscriptions.—Where a corporation is insolvent or has been dissolved, and there exists unpaid subscriptions to stock, equity will order the subscriptions paid to a receiver for the benefit of the creditors.—*Knight & Wall Co. v. Tampa Sand Lime Brick Co.*, Fla., 46 So. Rep. 285.

19. **Corporations**—Dissolution. — Where one corporation owns a majority or even all of the stock of another corporation, it does not destroy the identity or charter or corporate rights of the latter.—*Calor Oil & Gas Co. v. Franzell*, Ky., 109 S. W. Rep. 328.

20.—Domestic.—A railroad corporation created by the consolidation of two corporations, one domestic and one foreign, held a domestic corporation.—*Attorney General v. New York, N. H. & H. R. Co.*, Mass., 84 N. E. Rep. 737.

21.—Power of State to Exclude.—A state may entirely exclude a foreign corporation from doing business within its limits, and the right of such corporation to engage in business in another state depends upon the laws of that state, but regulations by a state must not violate the federal constitution or laws.—*International Text Book Co. v. Lynch*, Vt., 69 Atl. Rep. 541.

22.—Right to Contest Title to Corporate Property.—A caretaker placed in possession of land of a corporation by the officers thereof held not entitled to contest the validity of a mortgage in an action against him by the trustee of the mortgage bondholders of the corporation.—*Bruce v. Carolina Queen Consol. Min. Co.*, N. C., 61 S. E. Rep. 579.

23. **Courts**—Stenographers' Fees.—Under the statute regulating official stenographers, their duties and compensation, an official stenographer held entitled to fees for furnishing transcript, notwithstanding custom and practice of courts as to the duties of appellant's attorney in preparing a statement of facts.—*Ben C. Jones & Co. v. Smith*, Tex., 109 S. W. Rep. 1111.

24. **Covenants**—Right of Way.—Covenant by a grantor to provide a public right of way to the granted lands over lands retained held satisfied by a public right of way to the boundary of the granted land.—*Empire Bridge Co. v. Larkin Soap Co.*, 109 N. Y. Supp. 1062.

25. **Criminal Evidence** — Blood-hounds. — Where in a criminal case the testimony showed that trained blood hounds tracked accused to his home, the court properly excluded evidence of the conduct of other blood hounds which had been trained by the same person.—*Spears v. State*, Miss., 46 So. Rep. 166.

26.—Competency.—A certain box was offered in evidence by the state, and witness, to identify the box, was asked: "Does it look like it?" The witness answered "Yes; to the best of my knowledge it is the case that I received at the time." Held that the answer was competent.—*Minor v. State*, Fla., 46 So. Rep. 297.

27. **Criminal Law**—Disqualification of Juror.—Objections to a juror on the ground that he is not a citizen of the United States, and understands the English language imperfectly, cannot be raised for the first time on motion for a new trial after an adverse verdict.—*Okershauser v. State*, Wis., 116 N. W. Rep. 769.

28.—Escape Pending Appeal.—Where defendant, pending his appeal, escaped and did not voluntarily return, but was recaptured, his appeal will be dismissed.—*McCullough v. State*, Tex., 108 S. W. Rep. 1179.

29. **Criminal Trial**—Acquittal.—An acquittal directed by the court bars a subsequent prosecution notwithstanding an appeal by the commonwealth under Cr. Code Prac. Sec. 337.—*Commonwealth v. Murphy*, Ky., 109 S. W. Rep. 353.

30.—Circumstantial Evidence.—The test of the sufficiency of circumstantial evidence is whether the circumstances proven are susceptible to explanation upon any reasonable hypothesis consistent with innocence, and, if they are so susceptible, then accused should be acquitted.—*Way v. State*, Ala., 46 So. Rep. 273.

31. **Damages**—Mental Suffering.—A woman injured while pregnant held entitled to damages for her mental distress before the child's birth, due to her fear that it would be deformed, but not for disappointment after the child's birth, due to its deformity.—*Prescott v. Robinson*, N. H., 69 Atl. Rep. 522.

32. **Deeds**—Undue Influence.—Mere suspicion that because a son had the opportunity to advise his parents with respect to the disposition of their property, and the disposition was to some extent in his favor, he procured the making of the conveyances, is not enough to warrant a conclusion of undue influence.—*Slaughter v. McManigal*, Iowa, 116 N. W. Rep. 726.

33. **Discovery**—Production of Writings. — The referee having authority to require the production of writings, an order for the examination of plaintiff before trial, requiring him to produce certain books and papers, should be modified, on motion, by striking out such requirements.—*Knickerbocker Trust Co. v. Schroeder*, 109 N. Y. Supp. 1024.

34. **Drains**—Damages.—Objectors to the establishment of a ditch by appearing at a first hearing and not objecting, and by appearing at a second hearing after the first had been dismissed, and demanding more damages and a jury trial, had a right to be heard both on the public utility of the ditch and as to their damages.—*Heinz v. Buckham*, Minn., 116 N. W. Rep. 736.

35.—Proceedings for Establishment.—The fact that drainage commissioners were landowners in the district in which the assessments were made rendered them incompetent to spread the assessment roll, and hear objections to the assessment.—*Nutwood Drainage & Levee Dist. v. Reddish*, Ill., 84 N. E. Rep. 750.

36. **Easements**—Way of Necessity.—Where the owner of an estate grants part to another, leaving other lands of the grantor to which he can have access only by passing over the land granted, a way of necessity is reserved in the grant by implication.—*Empire Bridge Co. v. Larkin Soap Co.*, 109 N. Y. Supp. 1062.

37. **Elections**—Party Designation.—Where a person was nominated for Governor under the title "Democratic Citizens" by a faction of the Democratic Party, such designation was not the name of any other existing political party under St. 1907, p. 633, c. 560, sec. 1, and, though by petition under section 230, the electors voting the ticket should be counted as Democrats.—*Attorney General v. McOsker*, Mass., 84 N. E. Rep. 472.

38. **Election of Remedies**—Conclusiveness.—A seller of personal property held not to waive his right to claim title as provided in the purchase price notes by suing on the notes first due and levying on real estate under the judgment so obtained.—*Haynes v. Temple*, Mass., 84 N. E. Rep. 467.

39. Electricity — Negligence. — An electric company held liable for death to which its negligence in not guarding its wires contributed, though the negligence of deceased's employer in not furnishing a safe place to work concurred in the result.—*Byerly v. Consolidated Light, Power & Ice Co., Mo.*, 109 S. W. Rep. 1065.

40. Eminent Domain—Award by Commissioners. — An award by commissioners appointed to fix compensation in condemnation proceedings held not to be set aside, except in the case of palpable excessiveness or inadequacy, or the adoption of an erroneous principle in determining the amount.—*In re Board of Water Supply of City of New York*, 109 N. Y. Supp. 1036.

41. Estoppel—Easements. — Where the owner of an estate grants part to another, leaving other lands of the grantor to which he has access only by passing over the land granted, the fact that he gave a warranty deed will not estop him from asserting a right to easement over the land granted.—*Empire Bridge Co. v. Larkin Soap Co.*, 109 N. Y. Supp. 1062.

42.—Persons to Whom Available. — Where a person's agent hears of a stipulation of another through third persons, his principal cannot rely upon it as an estoppel, since the stipulation was not communicated to the principal or agent.—*Pleasant Hill Light, Power & Water Co. v. Quinlan, Mo.*, 109 S. W. Rep. 1061.

43. Evidence—Memorandum. — Where a written memorandum made by one party has not been concurred in by the other party, so as to make it the written contract of the parties, any competent evidence of an oral contract between them, including the written memorandum, is admissible.—*Hendrix v. Letourneau, Iowa*, 116 N. W. Rep. 729.

44. Executors and Administrators—Claims Against Estate. — Where a nephew presents a claim against his uncle's estate for services rendered for over twenty-one years to the decedent, he must show a definite contract for compensation at the death of his uncle.—*In re Duke's Estate*, 109 N. Y. Supp. 1087.

45.—Discovery of New Will. — The Supreme Court has no original jurisdiction to revoke an appointment of an administrator because of the discovery of a new will, even though the appointment was made after an appeal and upon a decree of that court.—*Crocker v. Crocker, Mass.*, 84 N. E. Rep. 476.

46. Frauds, Statute of—Debt of Another. — A promise by grantee of premises subject to mortgage to assume the same as a part of the consideration is not a promise to pay the debt of another within the statute of frauds.—*Herrin v. Abbe, Fla.*, 46 So. Rep. 183.

47. Gifts—Evidence. — On the issue whether a depositor in a savings bank made a gift of the deposit to a donee, evidence that at least a part of the money deposited belonged originally to the donee goes far to establish the gift.—*Supple v. Suffolk Sav. Bank for Seamen, Mass.*, 84 N. E. Rep. 432.

48. Habeas Corpus—Time for Application. — Where a prisoner is legally sentenced on a first count, the legality of his sentence on a second count to commence on the termination of his first sentence cannot be raised pending his sentence on the first count.—*People v. Frost*, 109 N. Y. Supp. 1121.

49. Homestead—Contract to Convey. — Where a single man contracted to sell and convey his homestead and thereafter married, the homestead rights of the wife in the land were sub-

ordinate to the contract, irrespective of whether or not she had notice of the contract before the marriage.—*Parriss v. Hughes, Tex.*, 109 S. W. Rep. 1140.

50. Homicide—Principals and Accessories. — If accused aided or abetted another in a homicide, it is unessential to accused's guilt that the other person know of such aiding or abetting.—*Way v. State, Ala.*, 46 So. Rep. 273.

51. Husband and Wife—Contracts at Common Law. — Any contract between husband and wife, at least without the intervention of a trustee, as well as every contract between the wife and any third person, was void at common law.—*Winter v. Winter, N. Y.*, 84 N. E. Rep. 382.

52. Indictment—Conclusions. — The statement in an indictment that accused did willfully point a deadly weapon at another is a conclusion of the pleader so far as it refers to the character of the weapon, since a weapon may be deadly or not, according to its nature or manner of use.—*Commonwealth v. White, Ky.*, 109 S. W. Rep. 324.

53. Injunction—Grounds. — Equity held authorized to restrain officers of a city from closing clubrooms controlled by the members of a lodge on the ground that ordinances of the city are violated.—*Canon City v. Manning, Col.*, 95 Pac. Rep. 537.

54. Interstate Commerce—What Constitutes. — Where plaintiff was engaged in business of instruction by correspondence, the instruction being carried on entirely by letter through the mails, it was not engaged in interstate commerce within the federal constitution so as to prevent a state from requiring it to pay a license tax as a condition precedent to doing business therein.—*International Text Book Co. v. Lynch, Vt.*, 69 Atl. Rep. 541.

55. Judges—Disqualification. — The fact that a judicial officer takes the affidavit of a party, charging another with the commission of an offense, does not make him counsel in the case, so as to disqualify him for trying it.—*Stepp v. State, Tex.*, 109 S. W. Rep. 1093.

56. Jury—Misconduct of Others Affecting Jurors. — Misconduct of a party to induce a jury to decide in his favor is dealt with more strictly by the court in its refusal to allow the retention of benefits under a verdict so obtained than similar misconduct of a third party or a juror without the knowledge of either party.—*Crocker v. Crocker, Mass.*, 84 N. E. Rep. 476.

57. Landlord and Tenant—Cropping Contract. — Where a landlord broke a cropping contract, he could not demand that the tenant keep his two brothers in his employment, so that their earnings would lessen the damage caused by the breach.—*Somers v. Musolf, Ark.*, 109 S. W. Rep. 1173.

58.—Duty of Lessee. — A lessee who might have protected himself against the collapse of a building by temporary shoring can not recover the consequential damages.—*Bennett v. Southern Scrap Material Co., La.*, 46 So. Rep. 211.

59.—Holding Over. — Where a lessee retained possession through its subtenants after the termination of the original term, it remained liable for rent under the lease during such possession.—*Ventura Hotel Co. v. Pabst Brewing Co., Ky.*, 109 S. W. Rep. 354.

60.—Lease. — A lease held not to relieve a landlord from liability for the negligence of the operator of a passenger elevator in the leased

building.—Cunningham v. Mutual Reserve Life Ins. Co., 109 N. Y. Supp. 1070.

61. **Life Estates—Lease by Life Tenant.**—Where a tenant by the curtesy executed a lease with the right to take sand and gravel from the shores of the property, a reference in the deed by the life tenant and remaindermen to the record of such lease did not constitute a ratification thereof.—Potomac Dredging Co. of Baltimore City v. Smoot, Md., 69 Atl. Rep. 507.

62. **Life Insurance—Reinsurance.**—Where an insurance company which contracted to reinsure the risks of another company expressly restricted its liability to claims arising by reason of death, held, it was not liable upon a cash surrender value provision of a policy.—Mutual Reserve Fund Life Assn. v. Green, Tex., 109 S. W. Rep. 1131.

63. **Limitation of Actions—Running of Statute.**—That an assignee for the benefit of creditors of a surviving partner made a payment on a firm note after the death of one partner will not prevent the running of limitations in favor of the estate of decedent.—In re Neber's Estate, 109 N. Y. Supp. 1090.

64. **Mandamus—Where Lies.**—Mandamus will not lie to compel a district judge to enter of record in the district court of a certain county an alleged order admitting defendant to bail, where the same is not there properly entitled to record.—State v. Russell, Okl., 95 Pac. Rep. 463.

65. **Master and Servant—Assumed Risk.**—A servant injured while riding in defendant's elevator held to have assumed the risk arising from the fact that the walls were plastered, instead of being lined with boards or metal, and from the fact that the platform was not guarded.—McDonald v. Dutton, Mass., 84 N. E. Rep. 434.

66. **Defective Appliances.**—It cannot be said as a matter of law that an employer furnishing a rubber hose to his servant for use does not owe to the servant the duty of using ordinary care to see that it is reasonably suitable.—Houston & T. C. R. Co. v. Patrick, Tex., 109 S. W. Rep. 1097.

67. **Failure of Servant to Observe Rule.**—Where an employee is injured in the line of his duty through failure to observe a rule imposed upon him, the doctrine of respondeat superior does not apply.—Memphis Consol. Gas & Electric Co. v. Simpson, Tenn., 109 S. W. Rep. 1155.

68. **Safe Place to Work.**—A servant cannot recover for injuries received because of the dangerous condition of a working place, where such condition was well known to him, or where it was his duty to ascertain the condition of the place, which he neglected to do.—Woelffen v. Lewiston-Carkson, Wash., 95 Pac. Rep. 493.

69. **Wrongful Discharge.**—Employee wrongfully discharged who cannot secure another position of same character held required to secure other employment for which he is fitted.—Wolf Cigar Stores Co. v. Kramer, Tex., 109 S. W. Rep. 990.

70. **Mines and Minerals—Natural Gas.**—An action held not to lie by the owner of a gas well against another well owner in the same district for exhaustion resulting from legitimate use or sale of the gas.—Calor Oil & Gas Co. v. Franzell, Ky., 109 S. W. Rep. 328.

71. **Municipal Corporations—Obstructions in Street.**—A person taking title to one half of a street, with an easement over the other half, is entitled to enjoin the erection of buildings

on such street.—Clymer v. Roberts, Pa., 69 Atl. Rep. 548.

72. **Use of Streets.**—Injury to a traveler on a street held the natural consequence of defendant's negligence in forcing steam into a drain in the street from which it arose and enveloped the traveler causing her to fall.—Smith v. Edison Electric Illuminating Co., Mass., 84 N. E. Rep. 434.

73. **Navigable Waters—Public Lands.**—Where the government grants land bordering on a navigable stream, and there is nothing indicating an intent to limit the grant to the water's edge, the grantee takes to the middle of the main channel.—Johnson v. Johnson, Idaho, 95 Pac. Rep. 499.

74. **Negligence—Dangerous Premises.**—An infant, injured falling down an unguarded elevator shaft in a wholesale grocery, in order to recover, must show the owner of the premises was under obligations to protect him from injury.—Faurot v. Oklahoma Wholesale Grocery Co., Okl., 95 Pac. Rep. 463.

75. **Dangerous Premises.**—A stockyard company that furnishes facilities for the receipt and sale of live stock, and retains control over the pavement in the alleys in its yards, and permits such pavement to become out of repair, held liable to a salesman who has the right to use said alleys, and by reason of said defects is injured.—Perrine v. Union Stockyards Co. of Omaha, Neb., 116 N. W. Rep. 776.

76. **Last Clear Chance.**—Contributory negligence will not exonerate the defendant and disentitle the plaintiff from recovering if defendant might by the exercise of reasonable care have avoided the consequences of plaintiff's negligence.—Atchison, T. & S. F. Ry. Co. v. Baker, Okl., 95 Pac. Rep. 433.

77. **Places Attractive to Children.**—Contractors held not liable for the death of a child which fell from timbers placed by them across a canal for the purpose of doing certain work, and left there by them on completion of the work.—Bum v. Weatherford & Cary Bros., La., 46 So. Rep. 317.

78. **Res Ipsa Loquitur.**—The maxim, "Res ipsa loquitur," has no application to an alleged breach of warranty that a rope would be sufficient to lower a safe.—Oregon Auto-Dispatch v. Portland Cordage Co., Or., 95 Pac. Rep. 498.

79. **Parent and Child—Custody of Child.**—Where a child of parents separated and living apart is only one and a half years old held custody of it should be given the mother.—Patterson v. Patterson, Ark., 109 S. W. Rep. 1168.

80. **Custody of Child.**—A widow who through poverty, places her little son in the care of its paternal grandmother for several years does not thereby forfeit her right to reclaim the child when she comes later into a better fortune.—State v. Steel, La., 46 So. Rep. 215.

81. **Partition—Sale.**—Where one who owns an undivided half interest in real estate which is not susceptible of division in kind holds the other half interest as usufructuary, the owner of the naked title to the half so held cannot force the sale of either the naked or the perfect title to effect a partition.—Smith v. Nelson, La., 46 So. Rep. 200.

82. **Partnership—Firm Debts.**—A firm cannot avoid liability as such for goods purchased by persons in charge because they had become incorporated, in the absence of notice, actual or constructive, to the seller.—Rice v. Patterson, Miss., 46 So. Rep. 255.

83.—**What Constitutes.**—A verbal agreement between two persons to purchase jointly a city lot, where one of the parties buys the land, paying the price and taking title, does not constitute a partnership.—*Mancuso v. Rosso*, Neb., 116 N. W. Rep. 679.

84. **Party Walls—Easements.**—Where a wall is entirely on the property of one party, the right of an adjoining owner to support therefrom is in the nature of an easement, which is terminated on the destruction of the building by fire.—*Bowhay v. Richards*, Neb., 116 N. W. Rep. 677.

85. **Physicians and Surgeons—Magic Healers.**—Those who profess to heal the sick by magic, physic or supernatural agency may be imposters, but are not physicians within Pol. Code 1895, Sections 1477-1491.—*Bennett v. Ware*, Ga., 61 S. E. Rep. 546.

86. **Principal and Agent—Payment of Note.**—Where payment is made to a person not having possession of securities properly indorsed, the burden of showing that such person was authorized to receive payment rests on the party making the claim of payment.—*Hoffmaster v. Black*, Ohio, 84 N. E. Rep. 423.

87. **Public Lands—Estoppel.**—On the issuance of a patent to land as soldiers' additional homestead to one who had theretofore assigned his soldiers' additional homestead scrip, the beneficial ownership passed to the assignee by the doctrine of relation or of enforced estoppel.—*Rogers v. Clark Iron Co.*, Minn., 116 N. W. Rep. 739.

88. **Railroads—Duty to Fence Track.**—Whether railroad premises constituted depot grounds, and whether open grounds around a switch could not be fenced without endangering employees so as not to necessitate the fencing of the grounds under Ann. St. 1906 Sec. 1105, held questions for the jury.—*Welch v. St. Louis & S. F. R. Co.*, Mo., 109 S. W. Rep. 1074.

89.—**Who are Passengers.**—A passenger in returning to the car for certain papers with the consent of the brakeman, and thereafter injured while attempting to alight after the train had started, held a passenger, and not a trespasser.—*Hill v. St. Louis, I. M. & S. R. Co.*, Ark., 109 S. W. Rep. 523.

90.—**Who Are Passenger.**—The relation of carrier and passenger in a street car case held to depend on offer and acceptance, and one cannot become a passenger by forcing his way upon a car against the will of the carrier.—*Hogner v. Boston Elevated Ry. Co.*, Mass., 84 N. E. Rep. 464.

91. **Remainders—Adjudication of Rights.**—Though a remainderman cannot have possession of land until the expiration of the preceding estate, he may sue to obtain an adjudication of his rights and interest, where adverse claims are asserted by persons in possession.—*Bowe v. Richmond*, Ky., 109 S. W. Rep. 359.

92. **Review—Probate Appeals.**—A court of equity has no jurisdiction over statutory proceedings prescribed for the probate court, but the practice of the supreme court in probate appeals follows the practice in equity so far as applicable, as indicated by Rev. Laws, c. 162, Sec. 15, and Id. c. 159, Sec. 20.—*Crocker v. Crocker*, Mass., 84 N. E. Rep. 476.

93. **Sales—Fraud.**—Whether an order for goods was procured by the fraud of the agent of the seller, authorizing the buyer to refuse to accept the goods, held for the jury.—*United*

States Gypsum Co. v. Shields, Tex., 108 S. W. Rep. 1165.

94.—**Sale or Return.**—What is a reasonable time to return goods under a contract for a "sale or return" is sometimes a question of law, and at others a question of fact. When it depends upon an inference from peculiar, numerous, or complicated circumstances, it is usually a question of fact.—*Greacen v. Poehman*, N. Y., 84 N. E. Rep. 390.

95. **Searches and Seizures—Evidence.**—In a prosecution of defendants for illegally selling liquor, etc., on Sunday, certain evidence obtained by officers illegally entering defendants' saloon for that purpose held admissible, and not violative of the constitutional prohibition relating to unreasonable searches and seizures.—*Cohn v. State*, Tenn., 109 S. W. Rep. 1149.

96. **Specific Performance—Relinquishment of Right.**—A vendee under a contract who in writing voluntarily relinquishes his rights therein, and leases the land from his former vendor, can not thereafter maintain specific performance.—*Swanson v. James*, Neb., 116 N. W. Rep. 780.

97. **Statutes—Construction.**—Where there is any doubt about the meaning of an excepting clause in a statute, the court may consider other statutes enacted on the same subject, though some of them are repealed.—*Steck v. Prentice*, Colo., 95 Pac. Rep. 552.

98. **Street Railroads—Injury to Passenger.**—Where plaintiff, while waiting for a car, was struck by the globe of an electric light broken by the trolley, the negligence of the defendant was for the jury.—*Kansas City Elevated Ry. Co. v. Groff*, Kan., 46 So. Rep. 394.

99. **Sunday—Secular Business or Labor.**—The doing of secular business or labor on Sunday which actually disturbs the public peace and quiet or disturbs a citizen in his proper observance of the day is a violation of Gen. St. 1902, Sec. 1369, prohibiting any secular business or labor except works of necessity or mercy on Sunday.—*State v. Ryan*, Conn., 69 Atl. Rep. 536.

100. **Taxation—Abatement of Tax.**—Where there is an overvaluation of a person's taxable interest in land, the owner being assessable for real estate, his remedy or that of his grantees is by abatement.—*Sullivan v. City of Boston*, Mass., 84 N. E. Rep. 443.

101.—**Tax Deed.**—Where plaintiff's tax deed was insufficient because of a defective description, but the land intended to be sold had been properly assessed and the delinquent taxes paid by plaintiff pursuant to the tax sale, the court properly foreclosed plaintiff's tax lien.—*Burkam v. Kunz*, 84 N. E. Rep. 766.

102.—**Tax Sale.**—The statute allowing two years for the redemption from a tax sale held not a statute of limitations within Const. Sec. 104, and the statute applies to a county.—*Tallahatchie County v. Little*, Miss., 46 So. Rep. 257.

103. **Telegraphs and Telephones—Consent of Owner of Land.**—Consent of an owner to the construction by a telephone company of a telephone line on a part of his land does not authorize the company to change its line to another part of the land over his objection.—*Russellville Home Telephone Co. v. Commonwealth*, Ky., 109 S. W. Rep. 340.

104.—**Death Message.**—Notice to the telegraph company of the special relations between the addressee of a telegram and the person whose death was thereby announced held not required to authorize recovery for mental suffering from nondelivery of message.—*Foreman*

v. Western Union Telegraph Co., Iowa, 116 N. W. Rep. 724.

105.—**Delay in Delivering.**—Recipient of a telegraph message held not entitled to maintain an action on contract for failure to promptly deliver the message where the sender did not telegraph as agent of the sendee.—*Western Union Telegraph Co. v. Adams, Ala.*, 46 So. Rep. 228.

106.—**Negligence.**—A telephone company maintaining its wires along a public highway must use reasonable care to avoid imperiling the safety of travelers.—*Crawford v. Standard Telephone Co., Iowa.*, 115 N. W. Rep. 878.

107. **Tenancy in Common**—Adverse Possession.—Inaction by tenants in common for 20 years in the face of notorious and exclusive possession is sufficient to rebut the presumption that the possession was subordinate to the legal title, and to establish the presumption of a grant.—*Powers v. Smith, S. C.*, 61 S. E. Rep. 222.

108. **Trespass**—Cutting Trees.—Cutting of trees interfering with defendant's telephone wire which has been maintained over the land in controversy for several years held not a willful or malicious cutting for which plaintiff could recover statutory penalties.—*Cumberland Telephone & Telegraph Co. v. Martin, Miss.*, 46 So. Rep. 247.

109. **Trover and Conversion**—Warehouse Receipts.—The reception of a portion of the proceeds of goods, knowing that the same had been wrongfully sold and converted by a warehouseman, held not a waiver, where a receipt was given expressly reserving all rights under the warehouse receipt.—*State v. Robb-Lawrence Co., N. D.*, 115 N. W. Rep. 846.

110. **Trusts**—Constructive Trusts.—The breach of confidence which a court of equity will construe as constituting fraud is the procurement of title by one by the consent and to the prejudice of another on a fraudulent promise as to the disposition of the property after the title is acquired and the violation of the agreement in attempting to hold the title free therefrom.—*Carr v. Craig, Iowa*, 116 N. W. Rep. 720.

111.—**Duty to Keep Accounts.**—It is incumbent on a trustee to keep an accurate account of his doings as such, and, where he fails to do so, and there is doubt as to how his accounts with the trust estate really stand, he can obtain no relief against the cestui que trust.—*Potter v. Porter, Ky.*, 109 S. W. Rep. 344.

112.—**Following Trust Funds.**—Where bank stock was transferred by a guardian, without authority, to decedent, the guardian was entitled to follow the property into decedent's hands, and assert a claim thereto or to the proceeds as a trust fund, against decedent or his creditors.—*McCutchen v. Roush, Iowa*, 115 N. W. Rep. 903.

113.—**Transfer of Securities.**—The doctrine that one acting in two different capacities cannot contract with himself does not prevent a trustee of different trust estates from transferring securities of one estate to himself as trustee of the other estate.—*French v. Hall, Mass.*, 84 N. E. Rep. 438.

114. **Vendor and Purchaser**—Bona Fide Purchasers.—A purchaser of property from a party holding the legal title in trust for another, with notice of the existence of the trust, is in no better position to assert title than the person from whom he purchased.—*Chadwick v. Arnold, Utah*, 95 Pac. Rep. 527.

115. **Waters and Water Courses**—Damages for Flooded Lands.—Where defendant obstructs the channel of a stream so that at times of flood waters plaintiff's property is injured, the measure of recovery is the difference in the fair market value of his property immediately before and immediately after the injury.—*McClure v. City of Broken Bow, Neb.*, 115 N. W. Rep. 1081.

116.—**Easements.**—A permanent right to maintain a drainage ditch over the lands of another for the benefit of adjacent lands is an easement, passing with the grant of the adjacent lands, though not specifically mentioned in the conveyance thereof.—*Brown v. Honeyfield, Iowa*, 116 N. W. Rep. 731.

117. **Wills**—Decree Allowing Appeal.—Where leave is granted to prosecute an appeal from the probate court by a justice having jurisdiction, matters of fact or law heard and determined by him cannot be heard again on motion to dismiss the appeal granted.—*In re Gurdy, Me.*, 69 Atl. Rep. 546.

118. **Witnesses**—Change of Testimony on Second Trial.—A trial court should be reluctant to credit a change in the testimony of a leading witness on a second trial where the change serves to adjust the case to the rule laid down by the appellate court in setting aside the result of a former trial.—*Czermak v. Wetzel*, 109 N. Y. Supp. 698.

119.—**Cross-Examination.**—In a proceeding to lay out a highway, where the owner of land to be taken had testified as to its value, he could be asked on cross-examination at what price he had assessed it.—*Gayle v. Court of County Com'rs., Ala.*, 46 So. Rep. 261.

120.—**Impeachment.**—Accused, desiring to contradict a state's witness by proving that he testified differently at the committing trial, held not entitled to offer the entire testimony of the other witnesses examined at the committing trial.—*Scott v. State, Miss.*, 46 So. Rep. 251.

121.—**Impeachment.**—Where an accused person testifies, the state may show any conduct or action on his part, the necessary or probable effect of which is to impute to him conduct or knowledge different from that which he has asserted.—*Southworth v. State, Tex.*, 109 S. W. Rep. 133.

122.—**Nature of Estate Created.**—Where the first named devisee in a will is given absolute power to dispose of the property, such devisee takes the fee unless the estate is expressly given for life only.—*Pratt v. Saline Valley Ry. Co., Mo.*, 108 S. W. Rep. 1099.

123.—**Necessaries Furnished Wife.**—In an action against a husband for goods sold to his wife, living separate from him, the testimony of the wife to show the purchase of the goods, their purpose and necessity held competent.—*Moore v. Rose, Mo.*, 108 S. W. Rep. 1105.

124.—**Transactions with Persons Since Deceased.**—In an action by an administrator of his wife's estate for services rendered by the wife to her father, since deceased, the administrator was competent to testify to the father's condition and to conversations had with him.—*In re Smith's Estate, Mich.*, 115 N. W. Rep. 1052.

125. **Work and Labor**—Action for Services of Child.—To support an action for compensation for the services of children rendered to their parent, it must be alleged and proved that there was a direct promise by the parent to pay for the service.—*Baugh v. Baugh's Adm'r., Ky.*, 109 S. W. Rep. 345.

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WHAT SHALL BE DONE WITH THE MOBS?

By Duane Mowry.

The recent outbreak in Springfield, Illinois, is another evidence that the rule of the mob is not sectional, but extends throughout the entire country.

Why is it that whole communities undertake to administer the law after their own way? Why is it that there seems to be no abatement in the number of these outbreaks? The answer is not hard to give. It is because mobs are practically assured freedom from *all* punishment. The word "all" is used advisedly. The history of prosecutions for the crime of mobs shows that but few cases of prosecutions have been attempted as compared with the great number of offenses actually committed, and but a comparatively few of those prosecutions have resulted in convictions. And in practically all of those cases, the prisoner was pardoned at an early period of his term.

This country prides itself upon its intelligence, upon its law-abiding qualities, upon its progressive ideas. And yet the fact remains to its everlasting shame and disgrace that the rule of the mob prevails here in larger measure than it does in any other civilized portion of the globe. Lynch law has become so frequent in this country that Justice Brewer, of the Supreme Court of the United States, says that it may be regarded as "a habit" of the American people. "Scarcely a day passes," he says, "that the people of some community have not, as it is said, taken the law into their own hands." Think of calling a crime "a habit," and that, too, by one of the justices of the highest court in the land. And yet the facts amply justify the statement.

Now, what is imperatively needed to meet this situation at the present time, as Dr. Cutler well says, those persons who compose the mob, and others may be included, too, have small respect for the law and less fear of it. For them it is absolutely necessary to invoke a policy which will bring about a change of feeling upon the situation. They must be taught to regard the law and have righteous dread of its violation. This cannot be accomplished by the existing laws as at present administered. The history of judicial procedure fully confirms this statement. Arrests are rarely made; convictions are next to impossible. Certainty of conviction of the guilty is the end to be aimed at. How is this to be attained? Only by radical changes in the criminal procedure of the country.

In the first place: The place of trial of those accused of the offense must be changed to some other part of the state than the county where it is charged the offense was committed. This is necessary in order to get a fair and impartial jury, fair and impartial alike to the state and the accused. To hope for a conviction by a jury of the county where the offense was charged to have been committed, no matter how overwhelming the evidence may be, is as reasonable to the average individual as to expect water to flow up hill. The right to change the place of trial should be vested in the state, and should be absolute.

Second: To allow a change of place of trial would make necessary an amendment to the respective constitutions of the states. For the constitutions now provide that the accused is entitled to a speedy trial by a jury of his county. This constitutional provision has worked a miscarriage of justice so often that the amendment is necessary in the interest of good order and the fair administration of the criminal laws.

Third: A preponderance of credible evidence should be sufficient to convict members of a mob. Evidence which satisfies beyond a reasonable doubt should not be required. The rule of evidence should be changed in this regard. The temptation

to commit perjury is so great that the change in the rule of evidence is absolutely essential in order to accomplish the ends of justice in this class of cases.

Fourth: Prosecuting attorneys are usually made by the electors of the respective counties. This fact serves, in many instances, and I personally believe, in most instances, to deter the state's attorney from vigorously prosecuting the mob. It seems wise, therefore, that the governor and the attorney general should have the discretionary power to substitute another attorney to prosecute the mob, supplanting the local prosecutor with an attorney who would not be controlled by local sentiment and feeling. A vigorous and determined prosecution is necessary that a conviction may follow. And it is a conviction of whole communities of guilty persons that is aimed at all of the time.

Fifth: In case the jury should acquit, the state should have the absolute right to have the case reviewed by the higher court before an absolute discharge of the prisoner or prisoners be entered. This is not a new suggestion, but is advocated by many able members of the bench and bar. It seems essential to prevent the miscarriage of justice in criminal cases. Undoubtedly, the near future will find such legislation on the statute books of many of the states.

These are confessedly radical changes in the existing criminal procedure of the land. But they are not too radical. The triumph of lawless force throughout the length and breadth of the land, a force that is unwhipped of justice, demands that this change should be made. It is true that Americans are a patient people. And they seem willing to bear the ills they have for an indefinite period, rather than fly to others that they know not of. But to maximize one lawless act in an attempt to minimize another infinitely greater to the entire social order of the country, is both cruel and preposterous to the ultimate degree. It has no foundation in reason or justice.

We want no self-appointed conservators of peace and order. Such persons belong

to the dark ages, and to the savages of the woods and plains. They are not good citizens. And the citizenship they have should be taken from them.

Quite apart from the foregoing, and yet closely related to it, is the suggestion that compensation be accorded the legal heirs of the victim of the mob by the state or county which failed to give adequate protection against the mob. Several of the states, (Illinois is one), have such a statute in force at the present time. It is a wise and eminently just provision. It can hardly fail of having a salutary influence.

NOTES OF IMPORTANT DECISIONS

CRIMINAL TRIAL—COMMENTS OF JUDGE ON GIVING INSTRUCTIONS.—Some judges have so little judicial bearing, so much of the spirit of the advocate that they never can resist the temptation to take sides in every case that comes before them. Such judges are able to keep their partisan interference out of the record, but very often they display their improper interest in the case in the more formal parts of the record and thus give occasion to courts of last resort to reverse verdicts and saddle the expense of a new trial upon the state.

This is what happened in the recent case of *State v. King* (Wash.), 97 Pac. 247, where it was held to be reversible error for a trial judge, in showing apparent reluctance to give an instruction on the defense of an alibi to state that he did not think it was necessary to instruct on the matter of alibi, but he would explain what it meant, since such comment was, in effect, infringing upon the province of the jury to pass upon the credibility of the evidence uninfluenced by the remarks of the court.

The appellate court's opinion is a sharp rebuke to the lower court for this unnecessary interposition of its own opinion on the facts. The court said: "Appellant contends that the remark of the court 'I don't think it was necessary to instruct the jury on that point,' tended to disparage the defense in the mind of the jury. We think this criticism has merit. This remark was prompted by one of two ideas, either that the evidence tending to prove an alibi was unworthy of consideration, or that the jury already knew the legal effect of such proof. In either event the remark was clearly reversible error, because there was evidence which tended to prove that the defendant was

at his home in bed sick when the crime was committed. It was exclusively the province of the jury to consider and pass upon the credibility of this evidence uninfluenced by the trial judge as to its credibility. There is nothing in the record to show that the jury were informed or knew the legal effect of an alibi if proven in the case, and it was therefore the duty of the court to give to the jury the law upon the question."

REGULATION OF RATES TO BE CHARGED BY PUBLIC SERVICE CORPORATIONS. —II. RAILROAD COMPANIES.*

In General.—Railroad companies are carriers for hire.¹ They are incorporated as such, and given extraordinary powers in order that they may the better serve the the public in that capacity.² They are engaged in a public employment affecting the public interest, and subject to legislative control as to their rates of fare and freight, unless protected by their charters.³ They must carry when called upon to do so,⁴ and, in the absence of any statutory regulation of the subject, they can charge only a reasonable compensation for the carriage.⁵ When controversies arise as to the reasonableness of such charge the judiciary must decide the question for them as it does when similar controversies arise where the rights of private individuals are concerned.⁶ In the transaction of their business railroad companies have no superior rights, but are subject to the same control and treatment

as are private persons or corporations.⁷ If the legislature prescribes a rate of charge for the guidance of such companies this act does not wholly remove the question of reasonableness from the jurisdiction of the courts. They are still possessed of sufficient authority to pass upon the reasonableness or unreasonableness of the statutory rate.⁸

When they see fit to do so, railroad companies may call upon the legislature to fix permanently a maximum rate of charge for their services, and have such provision made a part of their charters. When this is done their charter may present a contract against any future legislative interference.⁹

Police of Railroads; Extent of Exercise of Police Power Over Railroads.—In addition to the powers that may be reserved to the legislature by the constitution of a state, or to be found in charters incorporating railroad companies, the power to regulate such corporations may be found in the general control of the police of the country which is exerted by the law making power of all free states. Railroad companies may be given the right to regulate their own internal police, to be carried into effect by means of by-laws and the like, but such right or privilege is subject to the superior control of the legislature. This is a responsibility which legislatures cannot divest themselves of if they would. This power of the state extends to the protection of the lives, limbs, health, comfort, and quiet of all the people, and the protection of all property within the state. According to the maxim, *sic utere tuo ut alienum non laedas*, which is of universal application, it must be within the range of legislative action to define the mode and manner in which all persons may use his own, so as not to injure others. So far as railroads are concerned, this police power, residing primarily and ultimately in the legislature, is for the police of the road, and, when not exerted by the legislature, may be exercised by the corporations themselves over their operatives, and to some extent over all who transact business with them or come upon their grounds, by means of general statutes and the assistance of their officers. But when the public good demands it, the legislature may require railroad companies to maintain such a system of police as the public interest requires.¹⁰ The limit to the exercise of the police power over charter contracts is substantially this: The regulations must have reference to the comfort, safety, and welfare of society.

*The law on this subject as affecting other than railroad corporations is fully treated in Part I of this article published in last week's issue of the Central Law Journal.

(1) *Lawson's Rights, Rem. & Practice*, sec. 1792.

(2) *Chicago etc. R. Co. v. People*, 67 Ill. 11.

(3) *Munn v. People*, 94 U. S. 113; *Peik v. R. R. Co.*, 94 U. S. 164; *Budd v. New York*, 143 U. S. 517; *Dow v. Beldelman*, 125 U. S. 680. A railroad is but an improved modern highway, one which it is the duty and interest of the government to construct, when the public interest and convenience demand it. *Davidson v. Com'rs., etc.*, 18 Minn. 482; *Sharpless v. Mayer, etc.*, 21 Pa. St. 147; *Cherokee Nation v. R. R. Co.*, 135 U. S. 641; *Lake Shore, etc. R. Co. v. Ohio*, 173 U. S. 285.

(4) *Lawson, Rights, Rem. & Pract.*, secs. 1797, 1870.

(5) *People v. Budd*, 117 N. Y. 1, 20; 143 U. S. 517; *Munn v. Illinois*, *supra*; *Chicago, M. & St. P. R. Co. v. Minn.*, 134 U. S. 418; *Winona, etc. R. Co. v. Blake*, 94 U. S. 179; *Reagan v. Farmer's Loan, etc. Co.*, 154 U. S. 362; *Chicago, etc. R. Co. v. Osborne*, 52 Fed. Rep. 912.

(6) *Stone v. Farmer's etc. Co.*, 116 U. S. 307; *People v. Budd*, 117 N. Y. 1; 143 U. S. 517; *Munn v. Illinois*, 94 U. S. 113.

(7) *Minn., St. L. R. Co. v. Beckwith*, 129 U. S. 26; *Smyth v. Ames*, 169 U. S. 466, 522, 526; *Lake Shore, etc., R. Co. v. Smyth*, 173 U. S. 684. See *Missouri Pac. R. Co. v. Maikey*, 127 U. S. 205; *Stone v. Farmers', etc. Co.*, 116 U. S. 307.

(8) See paragraph No. 16.

(9) *C. B. & Q. R. Co. v. Cutts*, 94 U. S. 155.

(10) *Thorpe v. R. R. Co.*, 27 Vt. 140. See *Hageman v. R. R. Co.*, 16 Barb. 353.

They must not be in conflict with any of the provisions of the charter; and they must not under the pretense of regulation, take from the corporation any of the essential rights and privileges which the charter confers.¹¹ But a railroad company, even when it has been given an irrevocable charter, may be subjected to such subsequent laws as are necessary to secure the safety or protection of the public.¹² The control of the legislature over railroad companies may extend to the supervision of their tracks, switches, or the running upon the time of other trains; the use of improper rails; the number of brakemen upon a train; the running beyond a given rate of speed; and the employment of intemperate or incompetent engineers or servants. The legislature may require all their trains to come to a stand at railroad crossings or draw bridges. It may require the erection of fences along their right of way as a protection against the incursion of live stock, and subject the companies to damages for all stock killed upon their tracks, upon failure to comply with such requirement, without reference to the question of negligence, misconduct or inevitable accident.¹³ It may forbid discrimination by such companies in the carriage of persons or goods;¹⁴ and it may authorize an indictment against those who employ conductors without certificates as to color blindness as required by statute.¹⁵ It may require the speed of all trains to be checked at exposed places;¹⁶ and it may permit one railroad company to cross another's tracks. And it may require the former to share the expense of the crossing.¹⁷ But a statute making railroad companies liable for the expense of a coroner's inquest, and the burial of persons dying on their cars, or killed by collision or otherwise, is unconstitutional, so far as it attempts to make them liable in cases where they have violated no law or been guilty of no negligence.¹⁸ The legisla-

ture may require railroad companies to widen their bridges within cities for the convenience of the public.¹⁹ It may require them to light their roads, and upon failure to do so they may be made liable to a city which performs such service.²⁰ Upon their failure to deliver freight on tender of charges they may be made liable to the owners for an amount equal to the charges for every day's detention.²¹ They may be required to transfer car load lots from one line to another without unloading, unless such unloading is done without expense to the shipper.²² Street car companies may be compelled to make quarterly reports of the number of passengers carried by them.²³ But a law which imposes a penalty on railroad companies for failure to pay certain debts, is not a proper exercise of police power, and is invalid.²⁴ But they may be forbidden to lease their roads, or consolidate with foreign corporations, until the consent of the legislature has been obtained.²⁵ The legislature, however, has no right to take away or destroy their property, or annul the contracts of such corporations with third persons.²⁶

Right to Construct Railroads—Franchises.—As we have before observed, a railroad is but an improved modern highway,²⁷ which it is the duty of the state to construct when the public welfare and convenience demands it.²⁸ It is the duty of the government, with respect to the welfare of the public in general, and of trade in particular, to provide safe and commodious way of travel and communication. The state, however, may not choose to perform this duty directly. But as the right to make roads and to levy tolls is a prerogative of sovereignty, there

(11) Cooley, Const. Law, 311; Beer Co. v. Mass., 97 U. S. 25. A railroad company, although a quasi-public corporation, and although it operates a public highway, Cherokee Nation v. R. R. Co., 135 U. S. 641; Lake Shore etc. R. Co. v. Ohio, 173 U. S. 285, has rights which the legislature cannot deprive it of without a violation of the federal constitution. Symth v. Anes, 169 U. S. 466. Although under governmental control, that control must be exercised with due regard to constitutional guaranties for the protection of the property of the railroad companies. Lake Shore, etc. R. Co. v. Smyth, 173 U. S. 684.

(12) De Cuir v. Benson, 27 La. Ann. 1; Chicago, etc. R. Co. v. People, 67 Ill. 11.

(13) Thorpe v. R. R. Co., 27 Vt. 140.

(14) Chicago, etc. R. Co. v. People, 67 Ill. 11; De Cuir v. Benson, 27 La. Ann. 1.

(15) Nashville etc., R. Co. v. State, 83 Ala. 71; 126 U. S. 96.

(16) Chicago, etc. R. Co. v. Haggerty, 67 Ill. 113.

(17) Fitchburg, etc. R. Co. v. R. R. Co., 1 Allen, 552.

(18) Ohio R. R. Co. v. Lackey, 78 Ill. 55.

(19) English v. R. R. Co., 32 Conn. 240.

(20) C. H. & D. R. Co. v. Sullivan, 32 Ohio St. 152.

(21) Houston & T. C. R. Co. v. Harry, 63 Tex. 256.

(22) Burlington, C. R. & N. R. Co. v. Dey, 82 Iowa, 312.

(23) City of St. Louis v. St. L. R. Co. 14 Mo. App. 221.

(24) Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 151.

(25) Stockton v. Central R. Co., 50 N. J. Eq. 52.

(26) Greenwood v. Freight Co., 105 U. S. 13; Commonwealth v. Essex Co., 13 Gray, 239; People v. O'Brien, 111 N. Y. 1; Detroit v. Detroit, etc. Road, 43 Mich. 140; Lake Shore, etc. R. Co. v. Smith, 173 U. S. 690.

(27) Rogers v. R. R. Co., 3 Wall, 654; Olcott v. Supervisors, 83 U. S. 678; Smith v. Ames, 169 U. S. 466.

(28) Davidson v. Com'rs., 18 Minn. 482; Sharpless v. Mayer, 21 Pa. St. 147. That the government has not only the power, but it is its duty and interest, to construct railroads when the public benefit and convenience demand them, cannot admit of doubt; and, in like manner, governments are justified in exacting toll from those who travel on them, as a means to reimburse the state for the expense of their construction and reparation. Bloodgood v. The Mohawk, etc. R. Co., 18 Wend. 47.

must be a delegation of the state's right, or permission must be given, before the subject may undertake to perform such duty in the state's stead. In the hands of the subject this right or permission is a franchise,—a privilege or immunity of such public nature that it cannot be exercised without legislative authority.²⁹ A franchise, which, in England, is a branch of the royal prerogative, subsisting in the hands of a subject, in this country can only be derived from the legislature. Franchises are here, as in England, privileges of the sovereign in the hands of the subject. Whoever claims an exclusive privilege with us must show a grant from the legislature. A privilege or immunity of a public nature, which cannot be exercised without legislative grant, is a franchise.³⁰

Perhaps no principle of law is more firmly established in our jurisprudence than that the right to make and maintain a railroad, and to take tolls or fares from the public for the use thereof, is a privilege or immunity which can be exercised only by those who have obtained the state's consent. It is a privilege or immunity of precisely the same character as the right to construct an ordinary turnpike and levy tolls thereon.³¹ It is competent, therefore, for the legislature, when conferring such franchises, to reserve the right to control its exercise. Possessing such right of control originally, the legislature will continue to possess it,—it will retain it in any given case, in so far as it does not part with it by conferring exemption therefrom upon the recipient of the franchise.³²

Same.—Public or Private Use—Public Office—Public Interest—Rate of Charge—Contract.—Whether the use of a railroad is a public or a private one depends in no measure upon the question as to who constructed it or who owns it. It has never been considered a matter of any importance that the road was built by the agency of a private corporation. No matter who is the agent, the function performed is of a public nature. Though the ownership is private the use is public.³³ The owners are regarded as exercising a sort of public office, in the duties of which the public is interested. All their

rights and privileges, or those which pertain to such office, are granted by the state in the interest of the public. Their authority to take tolls and to exercise the right of eminent domain is conferred for the benefit of the public. They are, therefore, under governmental control, subject, of course, to constitutional guaranties for the protection of property.³⁴ Upon this principle it is held that statutes, declaring what shall be a reasonable compensation, or fixing a maximum beyond which any charge would be deemed unreasonable, for the use of property used and operated for railroad purposes, or for services rendered in such business, are within the competency of the legislature, and are constitutional.³⁵ The right, however, to regulate the charges of railroads may be bargained away by the legislature in particular instances. To guard against this contingency, the state may protect itself for all time, by constitutional provisions, and thus prevent any future curtailment of this right by

(34) *Munn v. Illinois*, 94 U. S. 113; *Budd v. New York*, 143 U. S. 517; *R. R. Co. v. Cutts* supra; *Dow v. Beldelman*, supra; *Smyth v. Ames*, supra.

(35) The legislature has power to provide by law for a maximum of charge to be made by railroads for fare and freight upon the transportation of persons and property carried within the state, or taken up outside the state and brought within it, or taken up inside and carried without the state. *Peik v. R. R. Co.*, 94 U. S. 164; *Chicago, etc. R. Co. v. Ackley*, 94 U. S. 179; *Winona, etc. R. Co. v. Blake*, 94 U. S. 180; *Ruggles v. Illinois*, 108 U. S. 536. A statute establishing a maximum of charge for transportation, is not unconstitutional. *C. B. & Q. R. Co. v. Iowa*, 94 U. S. 155; *Stone v. Loan Co.*, 116 U. S. 307; *Dow v. Beldelman*, 49 Ark. 325; *Same*, 125 U. S. 680; *Munn v. Illinois*, 94 U. S. 113; *R. R. Co. v. Minn.*, 134 U. S. 418. Such a law is not obnoxious to the constitutional provisions which declare that protection to the person and property is the paramount duty of the government and shall be impartial and complete. *Tilly v. R. R. Co.*, 5 Fed. Rep. 641. The state may require railroads to advertise annually and adhere through the year to a tariff of fares. *R. R. Co. v. Fuller*, 17 Wall. 560. There is no doubt of the general power of a state to regulate the fares and freights which may be charged and received by railroads. *Reagan v. Farmers', etc. Co.*, 154 U. S. 362; *Stone v. Wisconsin*, 94 U. S. 181; *R. R. Co. v. United States*, 99 U. S. 700; *Atty. Gen. v. R. R. Co.*, 35 Wis. 425; *Hinckley v. R. R. Co.*, 38 Wis. 194; *State v. R. R. Co.*, 19 Minn. 434; *R. R. Co. v. Cole*, 29 Ohio St. 126; *R. R. Co. v. Lawrence, etc. Co.*, 29 Ohio St. 208; *R. R. Co. v. Steiner*, 61 Ala. 559; *Ruggles v. People*, 91 Ill. 256; *Ill. Cent. R. Co. v. People*, 95 Ill. 313. The legislature cannot fix the rate for transportation too low. *Atty. Gen. v. Germantown, etc. R. Co.*, 55 Pa. St. 466; *Miller v. R. R. Co.*, 21 Barb. 513; *Ex parte Kohler*, 30 Fed. Rep. 86; *Stone v. Natchez, etc. R. Co.*, 62 Miss. 646.

(29) *Blake v. R. R. Co.*, 19 Minn. 418; *Olcott v. Supervisors*, 83 U. S. 678.

(30) *Blake v. R. R. Co.*, 19 Minn. 418; 18 Am. Rep. 345.

(31) *Blake v. R. R. Co.*, 19 Minn. 418; see *Munn v. Illinois*, 94 U. S. 113.

(32) *Dow v. Beldelman*, 125 U. S. 680; *R. R. Co. v. Cutts*, 94 U. S. 155; *R. R. Co. v. State*, 134 U. S. 418; *Ruggles v. People*, 108 U. S. 536.

(33) The right to exact tolls or charge freights is granted for a service to the public. The owners may be private companies, but they are obliged to permit the public to use their works in the manner in which such works can be used. *Olcott v. Supervisors*, 83 U. S. 678; *Rogers v. Burlington*, 3 Wall. 654; *Pine Grove v. Talcott*, 19 Wall. 666; *Smith v. Ames*, 169 U. S. 466.

the legislature.³⁶ But when there is to be found no such constitutional security or reservation of power, the right of freely arranging their tolls may be granted to railroad companies, thus making any attempt by succeeding legislatures to disturb the same an impairment of a contract.³⁷ But where a railroad company accepts a charter simply authorizing it to take tolls for the carriage of freight and passengers, then the legislature will be permitted to alter or revise its schedule of rates at such times and in such manner as the public interest requires.³⁸ It may alter or revise the tariff schedule of a railroad company whose charter provides that the rate of charge for the transportation of passengers shall not exceed five cents per mile. This provision will not be construed as a contract between the state and the company to the effect that the fare should never be reduced below that rate.³⁹ Nor, where the directors of a railroad corporation are given power to make all needful rules, regulations and by-laws, touching "the rates of toll and the manner of collecting the same," will there be such an irrepealable contract between the state and the corporation as will authorize the latter for all future time to fix its rates of toll free from legislative interference.⁴⁰ On the contrary, it is held by both state and federal courts, that where a railroad company receives a charter, containing a provision of this character, it will take it subject to the general law of the state, and such future general legislation and constitutional provisions as the state may see fit to provide, in the absence of any prior contract between it and the state exempting it from legislative interference.⁴¹ And this rule applies to charters of railroad companies which provide that they shall have the right "from time to time to fix, regulate and receive the tolls and charges by them to be received for transportation;" for the state, within the limits of its general authority, has the necessary power to act upon the rea-

sonableness of the tolls and charges so fixed and regulated.⁴²

The right of the state reasonably to limit the amount of charges to be received by railroad companies for the transportation of persons and property within its jurisdiction, is a power of government continuing in its nature, and cannot be bargained away by its legislature unless in words of positive grant, or in some manner equally as effective in law.⁴³ If there is reasonable doubt as to the purpose of the legislature, it must be resolved in favor of the existence of the power. In the words of Chief Justice Marshall: "Its abandonment ought not to be presumed in a case in which the deliberate purpose of the state to abandon it does not appear."⁴⁴ This rule is elementary, and the cases in the reports where it has been considered and applied are numerous. But there is nothing in the mere grant of power to make needful rules and

(36) *Bondholders v. R. R. Com'rs.*, Fed. Cases, No. 1625. In this case it was held that when the legislature has constitutional power to alter all railroad charters thereafter granted, it may make alterations reducing traffic rates, although this diminishes the value of franchises and tangible property.

(37) *Pingree v. R. R. Co.*, 76 N. W. Rep. 635; *R. R. Co. v. Cutts*, 94 U. S. 155.

(38) *Atty. Gen. v. R. R. Co.*, 35 Wis. 425.

(39) *Dow v. Beidelman*, 49 Ark. 325; *Same*, 125 U. S. 680.

(40) *Chicago, etc. R. Co. v. Minn.*, 134 U. S. 418.

(41) *Chicago, etc. R. Co. v. Minn.* *supra*. and cases cited. A charter authorizing the directors of a railroad to adopt and establish such a tariff of charges for the transportation of persons and property as they may think proper, and to alter and change the same at pleasure, is not a surrender of the state's right of control and regulation. *Stone v. Ill. Cent. R. Co.*, 116 U. S. 347. See *Penn. R. Co. v. Miller*, 132 U. S. 75.

(42) *Stone v. Farmers, etc., Co.*, 116 U. S. 307. In this case the court said, that while power is given to fix charges, they must be reasonable. What shall be deemed reasonable in law is nowhere indicated. There is no rate specified nor any limit set. Nothing is said of the way in which the question of reasonableness is to be settled. All that is left as it was. Consequently, all the power which the state had in the matter before the charter, is retained afterwards. The power to charge being coupled with the condition that the charge shall be reasonable, the state is left free to act on the subject of reasonableness within the limits of its general authority as circumstances may require. Only the right to fix reasonable charges has been granted, but the power of declaring what shall be deemed reasonable has not been surrendered. In the case of *Reagan v. Farmers', etc. Co.*, 154 U. S. 362, it was held that the courts were not authorized to revise or change the body of rates imposed by a legislature or a commission. They do not determine whether one rate is preferable to another, or what, under all circumstances, would be fair and reasonable, as between the carrier and the shipper. They do not engage in any mere administrative work. But still there can be no doubt of their power and duty to enquire whether a body of rates prescribed by a legislature or a commission is unjust and unreasonable, and such as to work a practical destruction to rights of property, and, if found so to be, to restrain its operation. In the case of *Smyth v. Ames*, 169 U. S. 466, the court held that rates cannot be so conclusively determined by the legislature, or by regulations adopted under its authority, that the matter may not become the subject of judicial inquiry. See generally on this subject: *Lake Shore, etc. Co. v. Smith*, 173 U. S. 684; *St. L. & etc. R. Co. v. Gill*, 156 U. S. 649; *Munn v. Illinois*, 94 U. S. 113; *Peik v. R. R. Co.*, 94 U. S. 164. Compare the latter cases with *Atty. Gen. v. R. R. Co.*, 35 Wis. 425.

(43) *Stone v. Farmers' etc. Co.*, 116 U. S. 307, and cases cited. See *Chicago, etc. R. Co. v. Minn.* 134 U. S. 418; *Georgia R. Co. v. Smith*, 128 U. S. 174; *Stone v. Ill. Cent. R. Co.*, 116 U. S. 347; *Penn. R. Co. v. Miller*, 132 U. S. 75.

(44) *Providence Bank v. Billings*, 4 Pet. 560.

regulations touching the rate of toll and the manner of collecting it, which can be properly interpreted as a relinquishment by the state of its general authority to regulate, at any future time, as the public interest may require, the rates of toll to be collected by such companies.⁴⁵

Classification of Roads for the Purpose of Fixing Rates.—The legislature, in the exercise of its power to regulate fares and freight, may classify the railroads of a state according to the amount of business which they have done or appear likely to do. Whether the classification shall be according to the number of passengers and the amount of freight carried,⁴⁶ or the amount of gross or net earnings, during a preceding year,⁴⁷ or according to the simpler and more constant test of the length of the line of the road,⁴⁸ is a matter within the discretion of the legislature. If the same rule is applied to all railroads of the same class, there will be no violation of the constitutional provision securing to all the equal protection of the laws, no matter how the classification is made.⁴⁹ Such a rule is general and uniform, not because it operates upon every person in the state. (for it does not), but because every person who is brought within the relation and circumstances provided for is affected by it. It is general and uniform in its operation upon all persons in the like situation, and the fact of its being general and uniform is not affected by the number of persons within the scope of its operation. When its effect is not to grant to one railroad company privileges and immunities which, upon the same terms, do not belong to all other railroad companies, it is not unconstitutional; for whenever a company comes within a given class, it will acquire all the "privileges and immunities" that are enjoyed by any other company within that class.⁵⁰ A uniform rate of charges for all railroad com-

panies in a state might operate unjustly upon some. It is proper, therefore, to provide in some way for an adaptation of the rates to the circumstances of the different roads.⁵¹

Reasonable Rates.—While there is no doubt of the State's power if unhampered by contract, to provide by legislation for maximum rates of charges for railroad companies, yet this power is subject to the proviso that it cannot be arbitrarily exercised. The state must prescribe, through its legislature, such rates as will be just to both the carrier and the public. The question whether rates are so unreasonably low as to deprive the carrier of its property without such compensation as the constitution provides for, or without due process of law, cannot be so conclusively determined by the legislature, or by regulations adopted under its authority, as to place the matter beyond the pale of judicial inquiry.⁵² A law, or regulation made under legislative authority, which establishes a rate that will not admit of railroads earning such compensation for the carriage of persons or property, as, under all the circumstances, is just to them and to the public, is a deprivation of property within the meaning of the constitution, and cannot be sustained.⁵³ "It is not to be inferred," declared the Supreme Court of the United States, "that this power of limitation or regulation (by the state of the charges of railroad companies) is itself without limit. This power to regulate is not a power to destroy; and limitation is not the equivalent of confiscation. Under pretense

(51) C. B. & Q. R. Co. v. Cutts, *supra*.

(52) Smyth v. Ames, 169 U. S. 466; Lake Shore etc. R. Co. v. Smith, 173 U. S. 684; Chicago, etc. R. Co. v. Wellman, 143 U. S. 339; Reagan v. Farmers', etc. R. Co., 154 U. S. 362; St. Louis, etc. R. Co. v. Gill, 156 U. S. 649; Dow v. Beldelman, 49 Ark. 325; Same, 125 U. S. 680; R. R. Commission Cases, 116 U. S. 307; Chicago, etc. R. Co. v. Minn., 134 U. S. 418. There is no fully settled test by which the reasonableness of rates may be determined. Ames v. R. R. Co., 64 Fed. Rep. 165. But it is safe to say that a rate which is not sufficient to pay the costs of service is an unreasonable one. Clyde v. Railroad Co., 57 Fed. Rep. 436. Compare the above cases with the doctrine as formerly applied by the United States Supreme Court in the case of Peik v. R. R. Co., 94 U. S. 164.

(53) Smyth v. Ames, 169 U. S. 466; St. Louis, etc. R. Co. v. Gill, 156 U. S. 649; Covington Turnp. Co. v. Sanford, 164 U. S. 578. While the legislature may prescribe the rate of transportation, its power to do so is qualified so that it cannot impair or destroy any vested or corporate rights by providing for inadequate rates. Ex parte Koehler, 23 Fed. Rep. 525; Ball v. Rutherford R. Co., 93 Fed. Rep. 513. When a state undertakes to prescribe maximum rates on local business by an inter-state carrier, it must do so with reference exclusively to what is just and reasonable as between the carrier and the public in respect to domestic business alone; and interstate business cannot be made to bear losses resulting from the rates prescribed for local business. Smyth v. Ames, *supra*. See Tilly v. R. R. Co., 5 Fed. Rep. 641.

(45) Chicago, etc. Co. v. Minn., 134 U. S. 418.

(46) C. B. & Q. R. Co. v. Cutts, 94 U. S. 155.

(47) C. B. & Q. R. Co. v. Atty. Gen., Fed. Cases, No. 2, 666; Ruggles v. People, 108 U. S. 526; Ill. Cent. R. Co. v. Illinois, 108 U. S. 544. A law fixing maximum rates of passenger fare upon railroads according to a classification based on the general passenger earnings, is not unconstitutional, as depriving them of property without due process of law. Wellman v. R. R. Co., 83 Mich. 592.

(48) Dow v. Beldelman, 125 U. S. 680. See State v. R. R. Co., 46 Neb. 682, where it was held that a statute requiring railroads, without judicial investigation, to carry freight over longer lines for the same rates imposed by any railroad for hauling the same freight between the same points by a shorter line, however great the disparity in the hauls, is in conflict with the Fourteenth Amendment to the constitution of the United States.

(49) Dow v. Beldelman, *supra*.

(50) C. B. & Q. R. Co. v. Cutts, 94 U. S. 155. See McAnnick v. R. R. Co., 20 Iowa 343.

of regulating fares and freights, the state cannot require a railroad company to carry persons and property without reward; neither can it do that which in law amounts to a taking of private property for public use, without just compensation, or without due process of law."⁵⁴ While the courts will not enter upon the mere administrative duty of framing tariffs of carriers, it is within their power, and, when the protection of persons and property require it, they will exercise such power, to restrain anything which, in the form of a regulation of rates, operates to deny to the owners of property used for railroad purposes, the protection which the constitution affords. It has always been the right and duty of courts to say whether the act of one party operates to deprive another of any rights of person or property. In every constitution is to be found the guaranty against the taking of private property for public purposes without just compensation. Under the Fourteenth Amendment, no state can deny to the individual the equal protection of the laws. This Amendment forbids legislation by which property of one person is, without compensation, taken from him for the benefit of another, or for the benefit of the public. Law, and the machinery of government, must, in their operation, "stop on the hither side of the unnecessary and uncompensated taking or destruction of private property, legally acquired and legally held."⁵⁵

Railroad Commissions—Fixing Rates.—The regulation of fares and freights may be carried on by means of commissions or administrative boards created by the state for carrying into effect its will as expressed by its legislation.⁵⁶ The powers usually conferred upon such bodies, over the matter of regulating charges for the transportation of persons and property, are very broad and full.⁵⁷ The principal restraint upon them is imposed by the commerce clause of the federal constitution; for that expressly prohibits any regulation of commerce between the states.⁵⁸ There are, of course, other constitutional restraints upon the powers of such commissions, but it is foreign to the purpose of this article to do more than incidentally mention them, or some of them, as we proceed.

While the state may create railroad commissions, and empower them to fix just and reason-

able rates for transportation,⁵⁹ it cannot empower them, nor have they the right, to arbitrarily change or fix a tariff of rates without giving the companies to be affected the right to be heard in their behalf.⁶⁰ A law compelling a carrier to change its rates and adopt such charges as a board of commissioners may declare to be equal and reasonable, without providing for a hearing before the commission, is unconstitutional. The effect of such law would be to deprive such companies as are affected by its provisions of their property without due process of law, in so far as it makes the decision of the commission, as to what is equal and reasonable, final and conclusive.⁶¹ Railroad companies have the right to require that just rates be fixed by the commission, and if a change of rates injures it in its property rights, this will be construed as a taking of its property within the meaning of the constitution. The courts may inquire into the justness of a change of rates, and appoint a special master to take testimony in relation thereto.⁶² The state will not be permitted to enforce compliance with the rates prescribed by a commission, irrespective of their reasonableness, or to embarrass railroad companies in their effort to invoke the protection of the federal courts against the taking of their property without due process of law.⁶³ But if such rates are reasonable, railroad companies may be compelled to comply with the commission's order regulating fares, and the company will not be heard to complain that such requirement operates to take its property for public uses without due process of law.⁶⁴

Joint Rates.—A law giving railroad commissions authority to compel railroad companies, whose tracks intersect each other, to put

(59) *Stone v. Loan Co.*, 116 U. S. 307; *Tilly v. R. R. Co.*, 5 Fed. Rep. 641. See *L. & N. R. Co. v. Commission*, 19 Fed. Rep. 679.

(60) *Mercantile Trust Co. v. R. R. Co.*, 51 Fed. Rep. 529; *Same v. R. R. Co.*, Id.; *Same v. Tyler. S. E. R. Co.*, Id.; *Farmers' Loan & T. Co. v. R. R. Co.*, Id.

(61) *Chicago, etc. R. Co. v. State*, 134 U. S. 418. See *Chicago, etc. R. Co. v. Jones*, 149 Ill. 361, in which case it was held that a statute, making the schedule of maximum rates fixed by a commission prima facie evidence of the reasonableness of such rate, is constitutional. See also *Richmond, etc. R. Co. v. Trammel*, 53 Fed. Rep. 196, where it was held that the legislature cannot confer upon the commission power to finally fix the charges to be made for the transportation of freight and passengers without giving the railroads a chance to be heard. See also, *Minn. etc. R. Co. v. State*, 134 U. S. 467.

(62) *Clyde v. R. R. Co.*, 57 Fed. Rep. 436; *Huldekoper v. Duncan*, Id.

(63) *Mercantile Trust Co. v. R. R. Co.*, 51 Fed. Rep. 529.

(64) *Chicago, etc. R. Co. v. Becker*, 32 Fed. Rep. 849; *Chicago, etc. R. Co. v. Iowa*, 94 U. S. 155; *Blake v. R. R. Co.*, 19 Minn. 418. See *Sloan v. R. R. Co.*, 61 Mo. 24; *Peik v. R. R. Co.*, 94 U. S. 164.

(54) *Stone v. Farmers', etc. Co.*, 116 U. S. 307, 331.

(55) *Reagan v. Farmers', etc. Co.*, 154 U. S. 362. In this case it was held that the courts could not say that in every case a rate which deprives investors of property is necessarily an unreasonable one.

(56) *Reagan v. Farmers', etc. Co.*, supra, citing *R. R. Commission Cases*, 116 U. S. 307.

(57) *Georgia, etc. R. Co. v. Smith*, 128 U. S. 174; *Winsor Coal Co. v. Dey*, 38 Fed. Rep. 656; *Burlington, etc. R. Co. v. Dey*, 82 Iowa 312.

(58) *Cunningham v. R. R. Co.*, 190 U. S. 446; *Reagan v. Trust Co.*, 154 U. S. 362.

in connecting switches at such crossings, and to transfer cars and make joint rates, is not unconstitutional, as depriving the companies included within its provisions of the right to contract with reference to their own business affairs.⁶⁵ The fact that joint rates are fixed by special proceedings before the commission, under a joint rate act, after notice has been given to the companies interested, does not constitute a taking of their property without due process of law.⁶⁶

Commissions Cannot Control Management of Road.—A state cannot invest railroad commissions with authority to notify a railroad company of what changes and improvements it should make, when it appears that repairs or additional rolling stock are necessary to keep its road in proper working order; or to say what changes of rates, or mode of operating its road, is desirable for this purpose. States have no authority to control the management of railroads, or to impair or take away their property rights, without due process of law.⁶⁷

Railroad Tickets; Mileage Books; Ticket Brokerage—Mileage Books—Reduced Rates. Although the legislature has power to establish maximum rates of charges for carrying goods and passengers upon railroads, it cannot assume to interfere with the management of the company while conducting its affairs pursuant to a statute regulating rates and charges.⁶⁸ Nor can it provide for a discrimination, or exception, in favor of those who may desire and are able to purchase tickets at what might be termed wholesale rates. It cannot, under such circumstances, require a company to keep for sale at a specified price, less than the regular rates, mileage books, or one-thousand-mile tickets, to be used in the name of the purchasers, when the maximum rates for transportation of passengers have been previously established.⁶⁹ A requirement of this kind does not come within the legislative power to fix maximum rates, nor is it a proper regulation of the affairs of the company. On the contrary, it has been held that such an interference with the affairs of a railroad company is a taking of property within the meaning of the constitution.⁷⁰ Furthermore, if it is not permissible for the legislature to require a railroad company to keep on sale mileage books at reduced rates, it certainly cannot be competent

to require it to redeem such books or tickets on presentation by other companies, or to accept those of other companies operating within the state as fare on its lines.⁷¹ If the legislature possessed this power it could, in a manner, authorize one road to determine the conditions on which another road should carry passengers, which would be a plain invasion of private rights secured by the constitution.⁷²

In like manner, it is unreasonable and illegal to require a street railway company to sell tickets at reduced rates when the road is only making a yearly net earning of a very small per cent on its bona fide investment, besides, at the same time, paying a very large rate of interest on its bonds.⁷³

Ticket Brokerage.—In some of the states statutes have been enacted making the business of ticket brokerage or ticket scalping unlawful, and requiring railroad companies to redeem unused tickets. These statutes have been upheld in Illinois, Indiana, Pennsylvania, Minnesota and Texas; and declared unconstitutional in New York.⁷⁴ While this legislation is doubtless intended for protection against fraud, the statutes have been sustained in most instances on other grounds. For example, in Illinois, the prohibition was upheld on the ground that the sale of tickets is an incident to a business affected with a public interest and subject to legislative control.⁷⁵

"We hold," said the Texas court, "in accordance with what we conceive to be the current of authority and the sounder view on this subject,

(71) *Atty. Gen. v. R. R. Co.*, 160 Mass. 62.

(72) A statute of this character is also, in effect, an appropriation of property for public uses without the owner's consent. *Atty. Gen. v. R. R. Co.*, supra.

(73) *Milwaukee Electric Ry. Co. v. Milwaukee*, 87 Fed. Rep. 577. The ordinance in question required the company, which was charging five cent fares, to sell six tickets for twenty-five cents, or twenty-five tickets for one dollar. The road's net earnings were only 3.3 per cent to 4.5 per cent on its investments, and it was paying 5 per cent interest on its bonds, in a city where the current rate of interest on first mortgage real estate security was 6 per cent.

(74) *Burdick v. People*, 149 Ill. 600; 36 N. E. Rep. 948; *State v. Corbett*, 57 Minn. 345; *Fry v. State*, 63 Ind. 552; *Commonwealth v. Keary*, 198 Pa. St. 500; *People ex rel Tyroler v. Warden*, 157 N. Y. 116; 51 N. E. Rep. 1006; *People v. Caldwell*, 64 App. Div. 46; 71 N. Y. Sup. 654; 168 N. Y. 671; *Commonwealth v. Wilson*, 14 Phila. 384; 56 Am. & Enr. R. Cases, 230; *Jannin v. State*, 51 S. W. Rep. (Tex.) 1126.

(75) *Burdick v. People*, 149 Ill. 600, 26 N. E. Rep. 948. It was held in this case that a statute was constitutional which required steamboat and railroad companies to provide each ticket agent with a certificate of authority, and required the companies to redeem unused tickets, and forbade persons not having such certificates from selling such tickets, except that any one who has bought a ticket from a certified agent, with the bona fide intention of traveling upon the same, may sell it.

(65) *Jacobson v. R. R. Co.*, 74 N. W. Rep. 893; 40 L. R. A. 389.

(66) *Burlington, etc. R. Co. v. Dey*, 82 Iowa 312.

(67) *L. & N. R. Co. v. R. R. Commission*, 19 Fed. Rep. 679.

(68) *Lake Shore, etc. R. Co. v. Smith*, 173 U. S. 684.

(69) *Lake Shore, etc. R. Co. v. Smith*, 173 U. S. 684; *Beardsly v. R. R. Co.*, 56 N. E. Rep. 488.

(70) See cases cited in preceding note.

that the legislature was authorized, as was done in this act, to confine the sale of passage tickets on railroad companies to the agents of such companies, and to make it penal for any other person to make a sale of same; that the ticket of a railroad company is not property, in the general acceptance of the term, but the purchaser has only a special property to passage on the road; that common carriers within this state are peculiarly subject to regulation; and that to preserve and protect both the passenger and the company itself against fraud is within the province of the police power of the state, and not violative of any provisions of the constitution, nor can it be said that such regulation is any wise the creation of a monopoly."⁷⁶

In New York, these statutes are unconstitutional, because they are, among other reasons, regarded as a denial to the citizen of the liberty of engaging in a legitimate business.⁷⁷

(76) *Jannin v. State*, 51 S. W. Rep. 1126; 53 L. R. A. 349. In *Fry v. State*, 63 Ind. 553, it was held that an act of this kind was a valid police regulation, and that whatever may be said either for or against the justice thereof, the legislature in its enactment did not exceed its legitimate power under the state constitution. Nor did such law impair the obligation of contracts, nor grant to any one privileges and immunities denied to others.

(77) *People v. Warden* 157 N. Y. 116; *Nealson v. R. R. Co.*, 5 N. Y. St. R. 256; *Quimby v. Vanderbilt*, 17 N. Y. 306; *Ranson vs. R. R. Co.*, 48 N. Y. 212; 8 Am. Rep. 543; *People v. Hogan*, 71 N. Y. Sup. 461. In passing on a law which provided that no person shall sell a passage ticket giving any right to a passage on any railroad train unless he is an authorized agent of the company running such train, and has received a certificate of authority therefor in writing from such company, it was said in substance by the court that such law was not a valid exercise of police power; that the legislature could not regulate the conduct of a railroad company's business simply because it is a creature of the legislature and a common carrier. Whether a railroad ticket be a token or prima facie evidence of the contract of carriage, when sold it belongs to the person purchasing, and unless its use is in some way limited, it has the same quality as every other kind of property, and to deprive the holder of the right to sell the ticket deprives him of his property. The fact that some dishonest persons have been engaged in the ticket brokerage business, with the result that frauds have been perpetrated on both travelers and transportation companies, does not justify the legislature in depriving every citizen of the liberty to further engage in such business. Such law, it was further held, is not constitutional as a police regulation of the ticket brokerage business, since it does not tend to promote the health, comfort or welfare of society. It conflicts with the constitutional provision that no person shall be deprived of life, liberty, or property, without due process of law since it deprives citizens of their liberty of engaging in the legitimate business of ticket brokerage. *People v. Caldwell*, 71 N. Y. Sup. 654; 64 App. Div. 46; 168 N. Y. 671.

It is held that these statutes have no application to the sale of a single ticket by a person not a dealer therein.⁷⁸

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(78) *State v. Clark*, 109 N. C. 739; *State v. Ray*, 109 N. C. 736. See *Burdick v. People*, 149 Ill. 600, 36 N. E. Rep. 948.

COURTS — SUPREME COURT — JURISDICTION—INJUNCTION.

STATE v. KENNER.

Supreme Court of Oklahoma, Aug. 29, 1908.

The supreme court is essentially a court of appeals, and is without original jurisdiction to issue writs of injunction in cases where the relief prayed for is purely injunctive.

KANE, J.: This is an original proceeding in the Supreme Court, commenced by the State of Oklahoma, on relation of Rutherford Brett, county attorney of Washita County, Okla., against H. A. Kenner, T. G. Sappington, and J. T. Hinds, county commissioners, W. B. Tharrington, county clerk of Washita County, Okla., and A. O. Campbell. The prayer of the petition reads as follows: "Wherefore, plaintiff prays that upon the hearing hereof, the said board of county commissioners, H. A. Kenner, T. G. Sappington and J. T. Hinds, and their successors in office, be perpetually enjoined from issuing said warrants, and from making any levy against the taxable property of said county for the purpose of redeeming said warrants, and from doing any further act looking to the fulfillment of said contract, and that W. B. Tharrington, county clerk of said county, and his successor in office, be enjoined from attesting any warrant or warrants issued or proposed to be issued, by the said board of county commissioners, or under its direction, in furtherance of the terms of said contract, and that the said A. O. Campbell be enjoined from taking any steps, or doing any act under said contract, with respect to the erection or construction of said courthouse, so provided for in said illegal contract, and that plaintiff have the costs herein incurred, and such other and further relief as it may be entitled to in equity."

From the foregoing it is obvious that the relief prayed for is purely injunctive. The question therefore arises: Has the Supreme Court original jurisdiction to issue writs of injunction in such cases? That the Supreme Court of the territory of Oklahoma had not

was settled in *Walck v. Murray et al.*, 18 Okla. 712, 91 Pac. 238, and the other Constitutional Convention Cases reported in the same volume. These cases followed the case of *Godbe v. Salt Lake City*, 1 Utah, 68, wherein Mr. Chief Justice McKean, after a thorough analysis of the Utah organic act, which was practically the same as the organic act of Oklahoma Territory, says: "A careful and analytical examination of all the law upon the subject must lead, it seems to me, irresistibly to the conclusion that this court has not general original jurisdiction, and that it cannot entertain the questions arising in the case at bar until it shall be called to pass upon them, in its appellate capacity."

It follows that, if this court has original jurisdiction to issue writs of injunction, it acquired such power through some provision of the state constitution. The part of section 170, Bunn's Constitution, conferring original jurisdiction on the Supreme Court, provides that: "The Supreme Court shall have power to issue writs of habeas corpus, mandamus, quo warranto, certiorari, prohibition, and such other remedial writs as may be provided by law and to hear and determine the same." It will be noticed that specific mention of the writ of injunction is omitted from this clause of the Constitution. A great many of the states have similar clauses in their Constitutions; most of them, though, as South Dakota, North Dakota, Illinois, Wisconsin and others, in granting original jurisdiction to their supreme courts have included the writ of injunction in the grant. Section 87 of the North Dakota Constitution empowers the Supreme Court of that state to issue writs of habeas corpus, mandamus, quo warranto, certiorari, injunctions, and such other original and remedial writs as may be necessary to the public exercise of its jurisdiction. In *State v. Nelson County*, 1 N. D. 88, 45 N. W. 33, 8 L. R. A. 283, 26 Am. St. Rep. 609, it was held that "an injunction, restraining a county from issuing bonds to procure seed grain for needy farmers residing therein, will not be granted in the first instance by the supreme court under the North Dakota Constitution, § 87, authorizing such court to issue such writs, as it will issue such writs only in a limited class of cases, and not in a matter of purely local concern." And again in the case of *State ex rel. Moore v. Archibald*, 5 N. D. 359, 66 N. W. 234, the same court held that: "The design of the North Dakota Constitution, § 87, empowering the supreme court to issue writs of habeas corpus, mandamus, quo warranto, certiorari, injunction, and such other original and remedial writs as may be necessary to the proper exercise of its jurisdiction was not to

confer on such court concurrent jurisdiction with the district court over all such writs, but only to give the former court jurisdiction in those cases in which the prerogatives of the sovereign power are directly and in some public and important respect involved, or the liberty of the citizen is at stake." This doctrine is approved in *People ex rel. Kocourek v. City of Chicago*, 193 Ill. 520, 62 N. E. 179, 58 L. R. A. 833, wherein it is held that the "Illinois Constitution, art. 6, § 2, giving the supreme court original jurisdiction in mandamus cases, extends only to cases involving the rights, interest, and franchises of the state, and the rights and interests of the whole people, to enforce the performance of high official duties affecting the public at large, and in emergency (which the court itself is to determine) to assume jurisdiction of cases affecting local public interest or private rights when necessary to prevent a failure of justice." In the case of *the Attorney General v. Railroad Companies*, 35 Wis. 425-520, Mr. Chief Justice Ryan, after discussing the clause in the Wisconsin Constitution conferring original jurisdiction upon the Supreme Court, says: "This view excludes jurisdiction of injunction in private suits, between private parties, proceeding on private right or wrong. In excluding them we feel quite assured that we are only giving effect to the very purpose and limit of the constitution in the granting of injunction. * * *

In our view the jurisdiction of the writ is of a quasi prerogative writ. The prerogative writs proper can issue only at the suit of the state or the attorney general in the right of the state; and so it must be with the writ of injunction, in its use as a quasi prerogative writ. * * *

It is the duty of the court to confine the exercise of its original jurisdiction to questions *publici juris*."

The constitutions of all the above named states specifically mention the writ of injunction in the clauses conferring original jurisdiction upon their supreme courts, but it will be seen by the excerpts quoted, and from cases construing such clauses, that even where that is the case the supreme courts have been exceedingly careful in assuming original jurisdiction, confining the exercise of such jurisdiction to cases involving the rights, interest, and franchises of the state, and the rights and interests of the whole people, and to enforce the performance of high official duties affecting the public at large. It is clear to our mind that if the framers of our constitution intended to confer on the supreme court original jurisdiction to issue writs of injunction, they would have followed in that respect the example of the states above referred to, whose constitutions were no doubt before them, and would not have relied upon general terms to confer

original jurisdiction on a court whose ordinary jurisdiction is essentially appellate. There are other sound reasons for omitting the writ of injunction from the clause of the constitution conferring original jurisdiction on the supreme court and leaving such jurisdiction to the district courts of the state, which courts have general original jurisdiction, and are provided by law with the machinery for summoning and impaneling juries. Section 34, Bunn's Const. provides that: "The legislature shall pass laws defining contempts and regulating the proceedings and punishment in matters of contempt: Provided, that any persons accused of violating or disobeying, when not in the presence or hearing of the court, or judge sitting as such, any order of injunction or restraint, made or entered by any court or judge of the state shall, before penalty or punishment is imposed, be entitled to a trial by jury as to the guilt or innocence of the accused. In no case shall a penalty or punishment be imposed for contempt, until an opportunity to be heard is given." In view of the foregoing restrictions upon the power of the courts to punish as for contempt the violation of injunctive orders, and in view of the fact that the supreme court is essentially a court of appeals, we are drawn to the conclusion that it is without jurisdiction to entertain the questions arising in the case at bar until it is called to pass upon them in its appellate capacity.

This construction also avoids the incongruity of giving to the supreme court original jurisdiction to issue writs of injunction when there is no adequate procedure to meet all the exigencies which may possibly arise from its exercise. Such an embarrassment was met by the supreme court of the territory in *Territory ex rel. Galbraith v. Chicago, Rock Island & Pacific Railway Co.*, 2 Okl. 108, 39 Pac. 389. The organic act gave the supreme court of the territory original jurisdiction in mandamus proceedings. In the above case mandamus proceedings were joined with a cause of action which presented an issue of fact. Under the Code the parties had a right to demand a jury trial, which the court was bound to grant as a matter of right, and which was not a matter of judicial discretion. The supreme court held that in such a case it was powerless to act, no way of summoning a jury having been provided by the legislature for the supreme court, and the cause was accordingly dismissed.

We therefore, hold that the supreme court is without original jurisdiction to issue writs of injunction in actions where the sole relief sought is the issuance of such writ. The cause is dismissed. All the Justices concur.

NOTE.—*Extent of Original Jurisdiction Exercised by Courts of Appeal.*—Under the constitutions of many states, appellate tribunals are given power "to issue writs of mandamus, injunction, quo warranto, habeas corpus, prohibition and other remedial and original writs." This provision may vary somewhat in the enumeration of the writs specified in the various state constitutions, but this, we apprehend, for reasons which will appear later, offers no ground for any substantial distinction where such enumeration is followed by the all embracing phrase "and other remedial and original writs." On this account, therefore, we believe we can discuss the question presented without distinguishing the constitutional provisions of the various states.

We do not believe that the statement will be seriously disputed when we say that, undoubtedly, the first and prime object of granting to appellate courts original jurisdiction to issue certain remedial writs, is to give them necessary and competent means of exercising superintendence and control over inferior tribunals. And in the early North Carolina case of *Bank of Newbern v. Stanley*, 2 Dev. 476, it was held that it was incompetent for an appellate court to use its original jurisdiction to control the acts of the officers of a subordinate court, except in the exercise of, and as ancillary to its revising power. Such is the view adopted by the Alabama courts, *Ex parte Candee*, 48 Ala. 386, loc. cit. 412; *Ex parte Croom*, 19 Ala. 562. In these cases it is held that the court can issue the original writs enumerated only after a lower court of general original jurisdiction has failed or refused to act. This exercise of jurisdiction is purely ancillary to the appellate jurisdiction of the court. It proceeds on the assumption that one of the purposes of the power to issue extraordinary remedial writs, is to prevent a failure of justice through the improper or arbitrary exercise of discretion on the part of trial judges in such cases where the slow processes of appeal would be ineffective to obtain redress. Thus, in *habeas corpus* proceedings application must be first made to a lower court and on refusal or failure of such court to grant the application, may be renewed, in lieu of appeal, in the supreme court. *Ex parte Croom*, supra. It has therefore been held that the right to appeal in *habeas corpus* proceedings did not affect the right to renew the application in the supreme court, the remedies being concurrent and both being an exercise of superintending control over inferior jurisdictions. This use of the extraordinary and remedial writs, it will be observed, is not strictly an exercise of original jurisdiction but more aptly ancillary to and in aid of the exercise of the right of appeal.

On the question as to the extent of the appellate court's strictly original jurisdiction to issue such writs, many appellate tribunals are in the utmost confusion as to what to do with the constitutional grant of power to issue the extraordinary writs, as usually enumerated, as well as the other "original and remedial writs," whatever this phrase might signify. The difficulty arises from the arbitrary and inconsistent construction of such clauses. For instance, writs of *habeas corpus*, *quo warranto* and prohibition are usually issued generally and without limitation in competition with like powers granted to courts of general original jurisdiction. But when the writs of mandamus and injunction are considered, the courts become fearful of their powers and even

where such writs stand shoulder to shoulder in the enumeration of original powers granted to a supreme court, they will not be issued with the same confidence and abandon. We apprehend, however, that the logic of the situation demands that at least all enumerated writs be treated with the same consideration. If the appellate court construes its power to issue writs of *habeas corpus* and *quo warranto* as concurrent with courts of general original jurisdiction, it should assume to exercise such concurrent jurisdiction in the issuance of writs of mandamus and injunction. This is the position taken by the South Carolina courts and possibly other tribunals. (*State v. Hayne*, 8 S. Car. 367). But, while this rule may be strictly logical, such a construction leads to even greater difficulties, as it opens the doors of our appellate courts, whose dockets are already crowded, to a flood-tide of litigation which they usually have not the proper means or equipment to handle as well as not being physically capable of transacting the amount of business that might be required of them.

Some appellate courts are so jealous of maintaining their theoretical right to the original jurisdiction granted to them and so violently opposed to ever exercising that jurisdiction in cases that have been presented to them, that lawyers in many states are confronted with the anomalous situation of having a recognized constitutional right to seek certain remedial and original writs directly from the supreme court, but being frequently arbitrarily denied redress. Thus, in Missouri, where the supreme court has authority to issue writs of *quo warranto* "and to hear and determine the same," the courts have held that they will only take jurisdiction when suit is begun by the attorney general, but at the same time will not renounce its jurisdiction to issue the writ at the relation of private parties whenever "a proper case" may come before it. *Stewart v. McIlhenny*, 32 Mo. 382; *Hequembourg v. Lawrence*, 38 Mo. 535; *State v. Vail*, 53 Mo. 97. In the last case cited the court said: "Whether this court will exercise jurisdiction in cases of information (in the nature of *quo warranto*) on the relation of a private person is another matter, depending somewhat on the discretion of the court; and where the statutes have provided other tribunals for their adjudication having all the power of this court and more facilities for the trial of issues that may arise, this court has generally declined the investigation of such cases."

The leading authority on this question without doubt is Chief Justice Ryan's masterful opinion in the case of *Attorney General v. Railroad Companies*, 35 Wis. 425, loc. cit. 511. But to observe this splendid and careful jurist struggling desperately with the question of the extent of the original jurisdiction conferred upon the supreme court of his state is to get some idea of the magnitude of the issue which one fails to appreciate in jurisdictions where more superficial judges arbitrarily cut the Gordian Knot by accepting and refusing jurisdiction at their pleasure without conscientiously striving to settle upon some logical and reasonable rule. The difficulty in the Wisconsin case was with the writ of injunction. Chief Justice Ryan first observed that this writ, unlike the others enumerated, was not an original writ, but one purely remedial and non-judicial. Jurisdiction was obtained by ordinary process and not by the mere issuance of

the writ and the question immediately arose, whether or not the grant of power to issue this writ was in effect a grant "of general equitable jurisdiction, in all cases, between all parties, where injunction is prayed." Justice Ryan instinctively recoiled from this construction, saying: "It would be a gross blemish upon the symmetry and economy of the constitutional distribution of jurisdiction, a solecism against the constitutional order observed in it, to attribute to the supreme court of the state original jurisdiction in one class of causes of private right, which is carefully excluded in all other causes, for no inherent distinction." Justice Ryan then proceeds to give his own admittedly original solution to this difficult problem and which many other courts have been quick to adopt as offering some substantial ground on which to approach the exercise of the original jurisdiction granted to appellate tribunals. The result of Justice Ryan's conclusions are well stated in the quotation in the principal case. The conclusion he arrives at is that all these extraordinary writs are given to appellate courts not to protect private rights, but "to protect the general interests and welfare of the state and its people, which it would not do to dissipate and scatter among many inferior courts."

Justice Ryan's conclusion, however, in the case just mentioned, is not marred by the inconsistency so often apparent in discussions of this question. He proceeds to apply the rule to the entire grant of original jurisdiction, including writs of *habeas corpus*, *quo warranto*, etc., saying: "It is the duty of the court to confine the exercise of its original jurisdiction to questions *publici juris*. And hereafter the court will require all classes of cases, as it has hitherto done some, in which it is sought to put its original jurisdiction in motion, to proceed upon leave first obtained, upon a *prima facie* showing that the case is one of which it is proper for the court to take cognizance." Let the Oklahoma court in the principal case and every other court which has cited Justice Ryan's remarkable argument follow that argument to its logical conclusion and withdraw its original jurisdiction altogether from private exploitation to be reserved exclusively for the "more authoritative protection of strictly public interests," or as ancillary to its superintending control over inferior tribunals.

When this conclusion is reached, many other difficulties vanish. Thus, the ridiculous construction of the usual phrase, "and all other original and remedial writs," as meaning nothing more than the writs enumerated will not be necessary in order to exclude the writ of injunction in those states where that writ is not expressly enumerated. As Justice Ryan well says, the writ of injunction is clearly a "remedial writ" and therefore is as plainly included under that general term "other remedial writs" as if it were more specifically enumerated.

When it is once understood that these extensive grants of original jurisdiction which are given to our appellate tribunals are not for the purpose of placing such tribunals in unnecessary competition with courts of general original jurisdiction but for the sole purpose of protecting strictly public rights, and that even in such cases the writs are to issue not as of right, but on leave first obtained on a *prima facie* showing that the cause is one involving questions *publici juris*.

ALEXANDER H. ROBBINS.

NEWS ITEM.

VALIDITY OF CONTRACTS AGREEING TO GIVE RAILROAD MILEAGE IN RETURN FOR ADVERTISING.

"If it be lawful to make the exchange of railroad transportation for advertising then it would be lawful to do the same in every transaction and the railroad business might lawfully become one of barter and sale, limited only by the demand."

In a decision handed down today by Judge C. C. Kohlsaat in the United States circuit court, from which the above is quoted, the jurist enjoined the issuance of transportation by the Chicago, Indianapolis & Louisville Railway company to the publishers of Munsey's Magazine in exchange for advertising.

The decision was rendered in a test case in which the federal authorities brought suit to prevent the carrying out of a contract entered into in January, 1907, between the railroad company and Frank A. Munsey & Co., providing for the issuance of trip tickets or mileage to the value of \$500 in consideration of certain advertising space in the publication of the magazine company.

The contract was alleged to be a violation of the Hepburn law.

Notice of an appeal to the United States supreme court was at once given by attorneys for the railroad company. The notice was filed in Judge Kohlsaat's court by E. C. Fields, vice-president and general solicitor for the Monon, following the reading of the opinion.

CORRESPONDENCE.

ALARMING INCREASE OF CASE LAW.

Editor Central Law Journal!

I have been attracted by the advertisement of the West Publishing Company in your issue of August 21st, to the effect that during the ten years from 1897 to 1906 the State and Federal Courts decided nearly one-half as many cases as had been decided in the two hundred and thirty-eight years preceding. This is really alarming. Is there no way to check this mass of opinions? Decisions now come so thick and fast, and there are so many conflicts, that the lawyer is quite at sea. Instead of the law becoming settled, it is becoming more and more unsettled. The majority of the opinions are also too long, showing a lack of care by the courts in studying the cases presented to them. The volume of case law produced from year to year is positively terrifying. The Attorneys General have recently organized an association, and possibly if the Supreme Courts of the country would meet in convention once a year they might devise some plan to limit this great output of decisions. In reading the digest in your Journal from week to week, I am astonished at the syllabi announcing in ordinary language the most primary and fundamental principles, as that a master is under obligation to provide a reasonably safe place for the servant to work.

Can you see any remedy for this trouble.

Yours truly,

G. E. McCAUGHAN.

Chicago, Ill.

HUMOR OF THE LAW.

"Give the devil his due." This phrase was turned very wittily by a member of the bar in North Carolina on three of his legal brethren. During the trial Hillman, Dews and Swain (the first-named distinguished lawyers, and the last also a distinguished lawyer and president of the university of the state) handed James Dodge, the clerk of the supreme court, the following epitaph:

Here lies James Dodge, who dodged all good,
And never dodged an evil;

And after dodging all he could,

He could not dodge the devil.

Mr. Dodge sent back to the gentlemen the annexed impromptu reply:

Here lies a Hillman and a Swain,

Their lot let no man choose;

They lived in sin and died in pain,

And the devil got his dues (Dews).

"I had a letter from a constituent," said Congressman Nathan Wesley Hale of Tennessee, "who asked me to forward him, as quickly as possible, the 'Rules and Regulations of Congress.' By return mail I sent him a photograph of Joe Cannon. If he understands the game like we do, he will have no trouble in seeing that my answer is decidedly to the point."—The Bar.

WEEKLY DIGEST.

Weekly Digest of ALL Current Opinions of ALL the State and Territorial Courts of Last Resort, and of all the Federal Courts.

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1. **Abatement and Revival**—Death of Joint Defendant.—When, in an action on a joint and several note, it is shown that one of the defendants has died since service had, the action abates only as to him, and, on verdict against all the defendants, the court may render judgment against the surviving defendants.—*Gillespie v. First Nat. Bank, Okl.*, 95 Pac. Rep. 220.

2. **Action**—Nature and Elements.—A cause of action consists in, first, the primary right and the facts from which it flows; and, second, the breach of that right and facts constituting such breach, which elements taken together create a remedial right.—*Lawson v. Tripp, Utah*, 95 Pac. Rep. 520.

3.—Other Action Pending.—There is no technical rule that the issues and parties must be identical in all respects in each, in order that the trial of one action may be stayed until after the trial of the other.—*De La Vergne Mach. Co. v. Brooklyn Brewing Co.*, 110 N. Y. Supp. 24.

4. **Adjoining Landowners**—Excavations.—As between the proprietors of adjacent land, neither proprietor may excavate his own soil so as to cause that of his neighbor to loosen and fall into the excavation.—*Village of Haverstraw v. Eckerson*, N. Y., 84 N. E. Rep. 578.

5. **Admiralty**—Reopening Case to Introduce Depositions.—After both parties have rested in a suit in admiralty and the case has been argued, it will not be reopened to permit the libellant to introduce depositions previously taken by the claimant, which the libellant might, if he had desired, have offered as a part of his own case.—*The Persiana*, U. S. D. C., S. D. N. Y., 158 Fed. Rep. 912.

6. **Adverse Possession**—Equitable Title of Plaintiff.—Limitations run against the holder of an equitable as well as against the holder of a legal title, and it is not essential to the bar of the statute that the title must be such as would support ejectment.—*Hibben v. Malone*, Ark., 109 S. W. Rep. 1008.

7. **Agriculture**—Destruction of Infected Apples.—If apples were infected, and their destruction was necessary to avoid injury to the fruit and the fruit interests of the state, the owners may not complain of their destruction by the state commissioner of horticulture.—*Shafford v. Brown*, Wash., 95 Pac. Rep. 270.

8. **Animals**—Killing Trespassing Animals.—In view of the omission from Rev. St. 1899, Sec. 3296, of the provision of the Rev. St. 1845, c. 79, Sec. 4, authorizing the killing of stock on the third incursion, where the landowner has a lawful fence, a landowner held criminally liable for killing another's stock, irrespective of how it gets into his field, unless the killing was necessary in an attempt to drive the stock out.—*State v. Prater*, Mo., 109 S. W. Rep. 1047.

9. **Appeal and Error**—Amendment to Statement.—Where numerous amendments have been allowed to a proposed statement on motion for a new trial, the statement should not be certified by the judge until all amendments allowed have been engrossed.—*Doust v. Rocky Mountain Bell Telephone Co.*, Idaho, 95 Pac. Rep. 209.

10.—Record.—An unsigned memorandum indorsed on the findings of the jury, not referred to therein, and not in response to submitted questions, cannot be considered by the Supreme

Court as a part of the findings.—*Chicago, R. I. & P. Ry. Co. v. Brandon*, Kan., 95 Pac. Rep. 573.

11.—Review.—Any irregularity or error connected with an order permitting the amendment of a demurrer after the same had been overruled was proper matter for determination on an appeal after final judgment.—*Dent v. Superior Court of Los Angeles County*, Cal., 95 Pac. Rep. 672.

12.—Settlement of Trust Accounts.—A decree of the probate court dismissing a petition filed by persons interested as remaindermen to compel a trustee to account and distribute the property held final and appealable.—*In re Cary's Estate*, Vt., 69 Atl. Rep. 736.

13. **Bailment**—Waiver as to Terms of Contract.—Acceptance of several months' rent after it was due, less a discount agreed to be paid on each month's rental paid before due, held not a waiver of the right of the lessor to collect the agreed rentals for subsequent months without the discount.—*United Shoe Machinery Co. v. Abbott*, U. S. C. C. of App., Eighth Circuit, 158 Fed. Rep. 762.

14. **Bankruptcy**—Conditional Sales.—Rev. St. Wis. 1878, Sec. 2317, held not to invalidate an unfiled conditional sale contract as between the parties, so that the buyer's trustee in bankruptcy did not acquire any greater rights with reference to the property than was possessed by the buyer.—*Mishawaka Woolen Mfg. Co. v. Smith*, U. S. D. C., W. D. Wis., 158 Fed. Rep. 885.

15.—Conditional Sales.—A contract reserving a lien on personal property unsold in the hands of the buyer and on the proceeds of the property sold held void as against the buyer's estate in bankruptcy because the contract was not filed.—*Pontiac Buggy Co. v. Skinner*, U. S. D. C., N. D. N. Y., 158 Fed. Rep. 858.

16.—Hearing in Bankruptcy Proceedings.—Declaring what shall constitute acts of bankruptcy, an alleged bankrupt corporation was not concluded in the bankruptcy proceedings by the appointment of a receiver of its assets in the state court, but was entitled to a hearing on the issue of insolvency at the time the bankruptcy petition was filed.—*In re Pickens Mfg. Co.*, U. S. D. C., W. D. Ga., 158 Fed. Rep. 894.

17.—Preferences.—The fact that accounts assigned by a bankrupt to a creditor as collateral security more than four months prior to the bankruptcy were collected within the four-month period does not entitle the trustee to recover such collections as preferences.—*Lowell v. International Trust Co.*, U. S. C. C. of App., First Circuit, 159 Fed. Rep. 781.

18.—Property in Possession of State Court.—A court of bankruptcy will not usually exercise its power to stay a suit in a state court and require it to surrender property taken into custody therein where it will result in no benefit to the estate, as where the suit is to enforce a valid lien exceeding the value of the property.—*Orr v. Tribble*, U. S. D. C., S. D. Ga., 158 Fed. Rep. 897.

19.—Provable Debts.—A claim held not provable under Bankr. Act, c. 541, Sec. 63a (4), as a debt on an implied contract.—*Switzer v. Henking*, U. S. C. C. of App., Sixth Circuit, 158 Fed. Rep. 784.

20.—What Constitutes Wages.—Commissions paid to a traveling salesman for his services are "wages" within Bankr. Act.—*In re Dexter*, U. S. C. C. of App., First Circuit, 158 Fed. Rep. 788.

21. **Banks and Banking**—Forged or Altered Check.—Where the erasure of the words "or order," and the insertion of the words "or bearer," in a check, without the authority of the maker, results in its payment to one other than the payee, the depositor's order cannot be charged with it.—*National Dredging Co. v. President, etc., of Farmers' Bank of State of Delaware, Del.*, 69 Atl. Rep. 607.

22.—**Ultra Vires Acts**.—Where a bank receives the benefit of a transaction, it is bound to account notwithstanding its cashier exceeded his authority in assuming, on behalf of the bank to act in the transaction.—*First Nat. Bank v. Bakken, N. D.*, 116 N. W. Rep. 92.

23. **Bills and Notes**—Bona Fide Purchasers.—A trust company receiving a check payable to a corporation in payment of the individual debt of the president of the corporation and another, held not a bona fide purchaser as against the corporation or its creditors, within Negotiable Instruments Law. *Laws, 1897, p. 732, c. 612, Secs. 91, 94, 95.*—*Ward v. City Trust Co. of New York, N. Y.*, 84 N. E. Rep. 585.

24.—**Drafts Drawn in Sets**.—Where two sets of drafts were drawn, the duplicate to be paid only in case the original was unpaid, the holder made out a prima facie case by producing the duplicates duly protested with notice of payment given, without accounting for the originals.—*Kessler v. Armstrong Cork Co., U. S. C. C. of App., Second Circuit*, 158 Fed. Rep. 744.

25.—**Joint Makers**.—Persons appearing on a note as joint makers, but being in part merely sureties were primarily liable to any holder of the note for the amount thereof, notwithstanding any irregularity in the indorsement.—*Johnston v. Schnabaum, Ark.*, 109 S. W. Rep. 1163.

26.—**Liability of Co-maker**.—A signer of a note, being a co-maker, held not discharged by the payee's promise to release him, and look to the principal debtor alone for the payment of the note; the promise of release being verbal only, and without consideration.—*Edmonston v. Ascough, Colo.*, 95 Pac. Rep. 313.

27. **Brokers**—Commissions.—In an action by a broker for commissions in procuring a tenant for defendant, whether plaintiff was employed by defendant, or requested by him to procure a tenant held, under the evidence, a question for the jury.—*Ballentine v. Mercer, Mo.*, 109 S. W. Rep. 1037.

28.—**Commissions**.—It was no defense to a broker's action for commissions that the memorandum of sale did not provide for exactly the same interest terms that the owner demanded; the brokers having offered to make good the difference.—*Riker v. Post*, 110 N. Y. Supp. 79.

29. **Cancellation of Instruments**—False Representations.—A party, suing for the cancellation of an instrument on the ground that false representations induced the making of it, has the burden of proving the false representations.—*United States Fidelity & Guaranty Co. v. First Nat. Bank of Dundee, Ill.*, 84 N. E. Rep. 670.

30. **Carriers**—Damages for Delay in Shipment.—Generally damages for delay in shipment or loss of property while in a carrier's custody may be recovered either in an action ex contractu or one ex delicto, at the option of the pleader.—*Wernick v. St. Louis & S. F. R. Co., Mo.*, 109 S. W. Rep. 1027.

31.—**Failure to Properly Route Shipment**.—The rule that a carrier is required to follow the shipper's instructions in routing and on failure to do so becomes an insurer held not to affect

the general rule for the measure of damages for breach of a contract of carriage.—*St. Louis Southwestern Ry. Co. of Texas v. Louisiana & Texas Lumber Co., Tex.*, 109 S. W. Rep. 1143.

32.—**Liability for Passenger Effects**.—A carrier is not liable for loss or injury to personal effects carried by a passenger, even though the loss or injury occurs through its negligence, either as carrier or warehouseman, where the effects are not baggage.—*Mexican Cent. Ry. Co. v. De Rosear, Tex.*, 109 S. W. Rep. 949.

33.—**Rules and Practices**.—The reasonableness of the time within which a carrier must receive moneys or goods for transportation is measured primarily by its relation to the transportation of the property to the business of the carrier with proper consideration of the business of its customers.—*Platt v. LeCocq, U. S. C. C. of App., Eighth Circuit*, 158 Fed. Rep. 723.

34. **Charities**—Rights of Heirs.—After a charitable trust has been established the heirs of the creator of the charity had no further interest in the proceedings, the protection of the rights of the public being within the jurisdiction of the attorney general.—*In re Burnham, N. H.*, 69 Atl. Rep. 720.

35. **Chattel Mortgages**—Property to be Manufactured.—Where a contract for the sale of buggies reserved a lien, it was immaterial that the buggies were not in existence when the contract was made; the buyer being required to file the contract on delivery of the buggies, if he desired a lien thereunder.—*Pontiac Buggy Co. v. Skinner, U. S. D. C., N. D. N. Y.*, 158 Fed. Rep. 958.

36. **Constitutional Law**—Attempt to Influence Jurors.—Under Pen. Code, Secs. 190, 193, an attempt to corrupt jurors constitutes a contempt, without reference to whether they have been drawn to try the particular case with reference to which they were sought to be influenced.—*State v. District Court of Second Judicial District, Mont.*, 95 Pac. Rep. 593.

37.—**Criminal Prosecutions**.—Whether one has been guilty of such violation of the law as justifies the seizure of his property or the infliction of punishment can only be determined by a court of competent jurisdiction.—*Canon City v. Manning, Colo.*, 95 Pac. Rep. 537.

38.—**Legislature and Judiciary**.—Whether the public good requires that the sale of liquor as a beverage should be entirely or only partially prohibited is for the legislature to determine, in the exercise of its discretion, and it is not for the court to inquire into the expediency or wisdom of such legislation.—*State v. Roberts, N. H.*, 69 Atl. Rep. 722.

39.—**License Tax**.—Rev. St. 1887, Sec. 1645, as amended by Act March 12, 1903 (*Sess Laws 1903*), w.l. under Const. art. 7, Sec. 2, be presumed to apply only to proprietors or keepers of billiard tables using the same in "doing business."—*Ex parte Gale, Idaho*, 95 Pac. Rep. 679.

40.—**Regulation of Carriers**.—*Laws 1907, c. 199*, requiring railway companies to sell 1000-mile tickets to purchasers to be used by themselves and their families at a rate lower than the maximum rate under which others may purchase, held to deny due process of law, and equal protection of the laws.—*State v. Great Northern Ry. Co., N. D.*, 116 N. W. Rep. 89.

41.—**Right to Contest Validity of Statute**.—A corporation purchasing the property and franchise of another corporation held not entitled to question the validity of an act accepted and acted on by the latter corporation.—*State v.*

Portland General Electric Co., Or., 95 Pac. Rep. 722.

42.—**Statutes.**—When a state adopts the constitutional or legislative provisions of another state, it also adopts the construction given to such provisions by the decisions of the court of the state from which they are taken.—*Lace v. People*, Colo., 95 Pac. Rep. 302.

43.—**Taxation.**—The provision of Laws 1899, p. 44, c. 41, that the total county tax rate shall not exceed eight mills on the dollar for all purposes held to violate Const. art. 6, Sec. 12, and article 13, Sec. 5.—*Fremont, E. & M. V. R. Co. v. County of Pennington* S. D., 116 N. W. Rep. 75.

44.—**Vested Rights.**—Laws 1907, p. 124, c. 91, providing that the total expense of widening a street should be borne by the municipality, notwithstanding any assessments theretofore levied, held not unconstitutional.—*In re Lochift*, 110 N. Y. Supp. 32.

45.—**Contracts—Construction.**—Where the performance of an obligation is prevented by one of the parties to a contract, the party prevented from discharging his part of the obligation will be treated as though he had performed it.—*Empson Packing Co. v. Clawson*, Colo., 95 Pac. Rep. 546.

46.—**Corporations—Right to do Business in Foreign State.**—Where plaintiff, a foreign corporation, alleged its right to do business in the state at the time of the execution of instruments sued on, a general denial held to raise the issue of a permit vel non, and to place on plaintiff the burden of proving authority to do business in the state at the time in question.—*Turner v. National Cotton Oil Co.*, Tex., 109 S. W. Rep. 1112.

47.—**Transfer of Assets.**—A corporation by the joint action of all officers, directors, and stockholders cannot authorize the application of corporate assets, as against corporate creditors to the personal debts of the corporation's officers.—*Ward v. City Trust Co. of New York*, N. Y., 84 N. E. Rep. 585.

48.—**Unconscionable Purchase of Property.**—Sale of certain real estate by the president of a corporation through his wife, its secretary, for an unconscionable consideration, held unsustainable; the corporation's receiver being entitled to credit on the purchase mortgage for the difference between the cost of the land to the wife and the price received by her from the corporation.—*Voorhees v. Malott*, N. J., 69 Atl. Rep. 643.

49.—**Criminal Law—Certificate of Reasonable Doubt.**—Compelling a person to appear before a grand jury and testify in a forgery case to facts bearing on his guilt of illegally practicing medicine, for which he was subsequently indicted by the same grand jury, held ground for granting a certificate of reasonable doubt on his appeal from a judgment of conviction.—*People v. Flaherty*, 110 N. Y. Supp. 154.

50.—**Nolle Prosequi.**—The statute requiring the county attorney to file his reasons for ordering the dismissal of a criminal prosecution held directory.—*Williams v. State*, Tex., 110 S. W. Rep. 63.

51.—**Criminal Trial—Favorable Error.**—A judgment of conviction will not be reversed on defendant's appeal for error in imposing a shorter term of imprisonment than the statute authorizes.—*People v. Oliver*, Cal., 95 Pac. Rep. 172.

52.—**Instructions.**—The refusal of the court in a trial for perjury to state in its charge the

rule requiring a single witness to be corroborated by circumstances to establish any material fact charged held proper on the ground that the rule was not applicable to the facts of the particular case.—*O'Leary v. United States*, U. S. C. C. of App., First Circuit, 158 Fed. Rep. 796.

53.—**Damages—Excessive Damages.**—In a personal injury suit against a carrier, a judgment for \$5,000 held excessive, and defendant entitled to a new trial, unless plaintiff agrees to accept \$2,500.—*Hemenway v. Washington Water Power Co.*, Wash., 95 Pac. Rep. 269.

54.—**Liquidated Damages.**—A contract by a vendor to pay an amount in excess of lawful interest on default of a simple contract debt is a contract for a penalty and against public policy.—*United Shoe Machinery Co. v. Abbott*, U. S. C. C. of App., Eighth Circuit, 158 Fed. Rep. 762.

55.—**Personal Injuries.**—Where plaintiff was struck by a "tie-jack" negligently allowed to fall from a flat car, and his nose broken, his upper lip split, the cord of his upper lip broken or mashed so that he had lost the use of the lip and his wrist broken, by reason of which he suffered great bodily and mental pain, and was permanently disfigured and disabled, \$5,000 damages was not excessive.—*Gurdon & Ft. Smith Ry. Co. v. Calhoun*, Ark., 109 S. W. Rep. 1017.

56.—**Dismissal and Nonsuit—Consent.**—Where executors were enjoined from expending more than a certain amount in erecting a mill, and this sum was afterwards extended by a consent order, the injunction could not afterwards be dissolved and the suit dismissed, except by consent of parties.—*In re Ward's Estate*, Mich., 116 N. W. Rep. 23.

57.—**Divorce—Cruelty.**—In a divorce action, evidence held not to show the infliction of bodily harm or a reasonable apprehension of such harm which would justify a divorce on the ground of intolerable severity.—*Mathewson v. Mathewson*, Vt., 69 Atl. Rep. 646.

58.—**Electricity—Negligence.**—Proof that plaintiff's husband was killed by a shock of electricity communicated by defendant's wire to that which the husband encountered held sufficient to require defendant to establish freedom from negligence under the doctrine *res ipsa loquitur*.—*Brown v. Consolidated Light, Power & Ice Co.*, Mo., 109 S. W. Rep. 1032.

59.—**Eminent Domain—Right to Damages.**—Where a railway company after a street is vacated enters on a strip of land formerly embraced in the street and without compensation, it is liable in damages for any depreciation in the value of the property not taken.—*Bullen v. Arkansas Valley & W. Ry. Co.*, Okl., 95 Pac. Rep. 476.

60.—**Injuries to Property.**—An abutting property owner whose means of access to his property have been cut off or materially interrupted by a railway track on the street may recover damages therefor.—*Foster Lumber Co. v. Arkansas Valley & W. Ry. Co.*, Okl., 95 Pac. Rep. 224.

61.—**Property Which May be Taken.**—Where a dam was built by authority of law and maintained for more than forty years, the pond being sufficient to float small craft, a drainage commission has no authority to destroy it, although the meandered limits of the river did not show such a pond.—*In re Horicon Drainage Dist.*, Wis., 116 N. W. Rep. 12.

62.—**Who may Appeal.**—Only persons having an estate or interest in the land taken can appeal from the estimate of damages, and per-

songs succeeding to the estate or interest of a deceased appellant cannot prosecute the appeal.—*Hayford v. Municipal Officers of City of Bangor, Me.*, 69 Atl. Rep. 688.

63. **Evidence**—Opinion Evidence.—A witness, after narrating the language and conduct of a person, held entitled to state, the inference that the person had a willful, unpleasant, and domineering disposition.—*Mathewson v. Mathewson*, Vt., 69 Atl. Rep. 646.

64.—Presumption as to Official Duties.—The presumption that a public officer has performed his duty is applicable to the duty of a county judge to pay to the county treasurer the surplus fees of his office.—*Frost v. Board of Comrs. of Teller County, Colo.*, 95 Pac. Rep. 239.

65. **Execution**—Rights of Purchaser.—Where a judgment creditor redeemed from a mortgage foreclosure sale and resold the land, the title of the purchaser at such resale related back to the date of the execution of the mortgage.—*Luken v. Pickle, Ind.*, 84 N. E. Rep. 561.

66. **Executors and Administrators**—Allowance of Claims.—The allowance of a sum due on a note against an estate by the commissioners for the allowance of claims is equivalent to a judgment, and merges the original claim, and the burden is upon one alleging the outlawry of that judgment to prove it.—*Warren's Admr. v. Bronson*, Vt., 69 Atl. Rep. 655.

67. **Fish**—Power to Regulate.—The law of Oregon prohibiting fishing in the Columbia river held not to deprive one having a license to fish therein issued by the state of Washington of any rights granted by the license.—*State v. Nielsen*, Or., 95 Pac. Rep. 720.

68. **Fixtures**—Effect of Lease.—A lease held to restrict the lessee's right to remove trade fixtures to such fixtures and alterations only as could be taken out of the building without interference with or detriment to the building, including its walls, ceilings and doors.—*Excelsior Brewing Co. v. Smith*, 110 N. Y. Supp. 8.

69. **Frauds, Statute of**—Contracts Performed as to Part Within Statute.—The provisions of the statute of frauds or of uses and trusts have no application where an agreement has been completely performed as to the part thereof which comes within the statute, and the part remaining to be performed is merely a payment of the money.—*Logan v. Brown*, Okl., 95 Pac. Rep. 441.

70.—Estoppel.—Where a party to an oral agreement to convey land conveys it, and the other parties accept it, under the contract, they are estopped to raise the objection that the contract was not in writing, as required by the statute of frauds.—*Pearsall v. Henry*, Cal., 95 Pac. Rep. 159.

71. **Fraudulent Conveyance**—Action to Set Aside.—Where a deed intended to defraud a former purchaser is made and recorded, the former purchaser gains nothing by subsequently recording his deed, but his remedy is by timely action to set aside the fraudulent deed.—*McDonald v. Sullivan*, Wis., 116 N. W. Rep. 10.

72.—Validity of Transaction Between Parties.—A person inducing another by misrepresentations to convey land to her, to be reconveyed on demand, held not allowed to take refuge behind the pretense that in yielding to her solicitations the grantor committed a wrong against others, so as to deprive him of redress for her refusal to reconvey.—*Chamberlain v. Chamberlain*, Cal., 95 Pac. Rep. 659.

73. **Guaranty**—Scope and Extent.—Where a

building contract provides for guaranty from a subcontractor, such provision cannot be extended by the subcontractor to a contract between himself and one furnishing labor and materials, unless he expressly stipulates for the same.—*Warren-Ehret Co. v. Byrd*, Pa., 69 Atl. Rep. 751.

74. **Husband and Wife**—Property Rights.—Property rights of husband and wife are, except as modified by statute, to be judged by the Spanish law in force in New Mexico at the date of its acquisition from Mexico.—*Reade v. De Lea*, N. M., 95 Pac. Rep. 131.

75. **Indians**—Land Allotment.—Where a citizen of the Creek Nation, who on April 22, 1899, had selected her allotment on the public domain died before patent issued, a patent therefor, issued to the heirs of such person without naming those vested in them the title to the land.—*De Graffenreid v. Iowa Land & Trust Co.*, Okl., 95 Pac. Rep. 624.

76. **Intoxicating Liquors**—Liquor Licenses.—A county ordinance relating to the granting of retail liquor licenses, held not invalid as allowing the electors to take the determination as to a license away from the board of supervisors.—*Davis v. Board of Sup'rs. of Merced County* (Cal.), 95 Pac. Rep. 170.

77. **Judgment**—Conclusiveness.—A final accounting of an executor before a surrogate does not preclude a proceeding against him for a subsequent accounting, based upon discovered assets which were not included in the first accounting.—*In re Heaney's Estate*, 110 N. Y. Sup. 80.

78.—Res Judicata.—To operate as a bar to a subsequent suit, the dismissal of a suit must have been on the merits, or, if voluntary, after proofs taken and the case was in readiness for hearing.—*In re Ward's Estate*, Mich., 116 N. W. Rep. 23.

79. **Landlord and Tenant**—Damages for Turning Off Heat.—A tenant held estopped to claim damages for turning off heat, by a covenant that no action should be brought for trespass in case of dispossession after forfeiture.—*Howe v. Frith*, Colo., 95 Pac. Rep. 603.

80.—Defective Premises.—A tenant is not guilty of contributory negligence, as a matter of law, in continuing to use defective premises after repeated assurances by the landlord that he would repair, so as to preclude the tenant's recovery for personal injuries, unless the risk was so obvious as to threaten immediate danger.—*Graff v. Lemm Brewing Co.*, Mo., 109 S. W. Rep. 1044.

81.—Estoppel to Deny Landlord's Title.—A tenant is not estopped to deny his landlord's title in an action wherein the landlord claims title in fee, but is estopped merely in actions arising out of that relation.—*Hebden v. Bina*, N. D., 116 N. W. Rep. 85.

82.—Liability for Rent.—Lessee, having continued to occupy the premises after breach by lessor of a covenant not a condition precedent to the payment of rent, held liable for rent.—*White v. Young Men's Christian Assn. of Chicago*, Ill., 84 N. E. Rep. 658.

83. **Libel and Slander**—Actionable Words.—A publication charging a person with a statutory offense, designating it as "assault and battery with intent to kill," held actionable, though the offense was not charged in the words of the statute as "assault with intent to kill."—*Gordon v. Journal Pub. Co.*, Vt., 69 Atl. Rep. 742.

84. **Logs and Logging**—Scale Bill.—In an ac-

tion on a contract under which plaintiff agreed to cut and haul certain logs at a fixed sum per thousand feet, verdict for plaintiff for the amount cut and hauled according to the scale bill of the surveyor agreed upon held sustained by the evidence.—*Atwood v. Maine Hub & Mfg. Co., Me.*, 69 Atl. Rep. 622.

85. **Master and Servant—Assumed Risk.**—Where a servant knows or should reasonably know the risks to which he is exposed, he will as a rule be held to assume them; but where he does not know, or knowing, does not appreciate such risks, and his ignorance or nonappreciation is not due to want of care on his part, he does not assume the risk.—*Millen v. Pacific Bridge Co., Or.*, 95 Pac. Rep. 196.

86.—**Defective Appliances.**—Where defendant directed its employees to work on a scaffold which was already built, it was bound to exercise due care in selecting materials reasonably suitable and safe for the construction of the scaffold.—*Barkley v. South Atlantic Waste Co., N. C.*, 61 S. E. Rep. 565.

87.—**Defective Appliances.**—Where an employee is injured by a machine, the master is not liable because of the removal from the machine before the accident of a small appliance which was not a safety appliance, and which would not if in use, have avoided the accident.—*Calhoun v. Holland Laundry, Pa.*, 69 Atl. Rep. 756.

88.—**Defective Appliances.**—An employer must exercise diligence to furnish to its employees reasonably safe appliances, and, in the absence of any notice thereof, the employees may assume that the duty has been discharged.—*Rush v. Oregon Power Co., Or.*, 95 Pac. Rep. 193.

89.—**Negligence of Servant.**—Where a servant was employed to manufacture a certain article from materials owned by his employer, acceptance of the finished product and sale thereof by the latter held not to constitute a waiver of damages for the servant's negligence.—*Wenger v. Marty, Wis.*, 116 N. W. Rep. 7.

90.—**Safe Place to Work.**—A master, while free to adopt and carry out its own plans for dismantling a building, held required to exercise the standard of care prescribed by law for the safety of its servants.—*American Window Glass Co. v. Noe, U. S. C. C. of App., Seventh Circuit*, 158 Fed. Rep. 777.

91.—**Safe Place to Work.**—Where defendant permitted oil to drip from a shaft hanger onto the floor near where plaintiff was required to work, and plaintiff slipped on the oil and was injured, defendant was negligent.—*Leazotte v. Jackson Mfg. Co., N. H.*, 69 Atl. Rep. 640.

92. **Mechanics' Lien—Right to Enforce.**—A contractor is not entitled to enforce a mechanic's lien, where it does not appear that the work and material necessary to entitle him to the stipulated payment has been done and furnished.—*Paturzo v. Shuldiner*, 110 N. Y. Supp. 137.

93. **Municipal Corporations—Commitment Under Municipal Ordinance.**—A commitment is proper where the sentence for the violation of a municipal ordinance is imprisonment without a fine, and, where the sentence is imprisonment in default of payment of the fine, a commitment to carry the judgment into effect is proper.—*Olson v. Hawkins, Wis.*, 116 N. Y. Supp. 18.

94.—**Contract Bids.**—Where the thing to be furnished under a municipal contract is protected by a patent, and any one of a number of par-

ticular kinds complies with the standard alternative bids are proper.—*Parker v. City of Philadelphia, Pa.*, 69 Atl. Rep. 670.

95.—**Highways.**—A municipality is not under a similar obligation as to lateral support to the owner of land abutting a street as adjacent land-owners are to each other, because as to the construction and maintenance of a public highway it exercises a governmental function.—*Village of Haverstraw v. Eckerson, N. Y.*, 84 N. E. Rep. 378.

96.—**Removal of Policemen.**—While the power to convict and punish a patrolman for conduct unbecoming an officer is vested solely in the police commissioner, he may do so upon evidence taken at a hearing before a deputy commissioner and reported to him; but he must himself pass upon the evidence.—*People v. McAdoo*, 110 N. Y. Supp. 140.

97.—**Statutes Authorizing Indebtedness.**—St. 1901, p. 27, c. 32, authorizing the incurring of indebtedness by cities, etc., for municipal improvements, and the submission of propositions to the electors, authorized the submission of a proposition for incurring an indebtedness for acquiring a public park.—*City of San Diego v. Potter, Cal.*, 95 Atl. Rep. 146.

98. **Negligence—Dangerous Premises.**—In an action against the proprietors of a department store to recover for personal injuries in falling down a hatchway in a public pavement alongside of the store, evidence held to sustain verdict for plaintiff.—*Ayres v. Wanamaker, Pa.*, 69 Atl. Rep. 759.

99.—**Proximate Cause.**—A person is liable for injuries resulting from his negligent act if they are the natural, though not inevitable, result thereof or such injuries as are ordinarily likely to ensue therefrom, though he may not have been able to foresee them.—*Evansville Hoop & Stave Co. v. Bauey, Ind.*, 84 N. E. Rep. 549.

100.—**Question for Jury.**—Where negligence is dependent on inferences to be drawn from acts of that character that different intelligent minds may honestly reach different conclusions, whether negligence has been established is for the jury.—*Farrier v. Colorado Springs Rapid Transit Ry. Co., Colo.*, 95 Pac. Rep. 294.

101. **Principal and Agent—Authority of Agent.**—One who leads an innocent party to rely on the appearance of another's authority to act for him will not be heard to deny the agency, to that party's prejudice.—*United States Fidelity & Guaranty Co. v. Shirk, Ok.*, 95 Pac. Rep. 218.

102. **Public Lands—Homestead Entry.**—One making a homestead entry of land inclosed, cultivated and in the actual possession of another held to have no right to dispossess the other.—*Carmichael v. Campodonico, Cal.*, 95 Pac. Rep. 164.

103. **Railroads—Continuous Trip.**—A railroad corporation, not operating a single system, may operate two or more lines of road between its terminals; but a passenger purchasing a through ticket to his point of destination cannot take a circuitous road.—*Kelly v. New York City Ry. Co., N. Y.*, 84 N. E. Rep. 569.

104.—**Injury to Trespassers.**—Railroad company held not liable for damages for death of pedestrian caused by the backing of an engine and cars on to a side track, putting in motion a number of cars thereon and causing the pedestrian to be run over.—*Curtis v. Southern Ry. Co., Ga.*, 61 S. E. Rep. 539.

105. **Receivers—Mortgages.**—Where a receiver is appointed to collect the rents of mortgaged property for the benefit of a junior mortgagee, the senior mortgagee not objecting, may not after sale have such order modified to secure the benefit of the rents collected thereunder.—*Godard v. Clarke*, Neb., 116 N. W. Rep. 41.

106. **Release—Execution.**—A finding that a release relied on by defendant to defeat an action for personal injuries was never signed by plaintiff is justified on the positive testimony of plaintiff that he never signed the release as pleaded by defendant.—*Dalton v. Pacific Electric Ry. Co.*, Cal., 94 Pac. Rep. 868.

107. **Remainders—Limitation of Actions.**—Where real estate is in the possession of a life tenant, limitations do not run against the remainderman until the death of the life tenant or until his life estate is otherwise terminated.—*Webster v. Pittsburg, C. & T. R. Co.*, Ohio, 84 N. E. Rep. 592.

108. **Removal of Causes—Citizenship of Defendants.**—An action by a citizen of another state against citizens of the state in which it is brought and allens is not removable.—*Hackett v. Kuhne*, U. S. C. C., S. D. N. Y., 157 Fed. Rep. 317.

109. **Remand.**—Where a cause is erroneously removed from a state court to the Circuit Court of the United States and thereafter remanded, all orders made by the United States court, except the one remanding the case, are void.—*Floody v. Chicago, St. P., M. & O. Ry. Co.*, Minn., 116 N. Y. Supp. 111.

110. **Sales—Conditional Sales.**—Where a sale was made on condition that the title remain in the seller until the purchase price was paid, the seller is entitled to immediate possession in case of default in the payment of any installment of the purchase price.—*Berger v. Miller*, Ark., 109 S. W. Rep. 1015.

111. **Specific Performance—Contracts Enforceable.**—A vote of a corporation's directors to grant a privilege to sell candy, popcorn, etc., held not a contract specifically enforceable.—*Hazard v. Hope Land Co.*, R. I., 69 Atl. Rep. 602.

112. **Gifts.**—One promising to make a gift of real estate held required to make the gift on the promisee accepting the promise, entering into possession and making improvements.—*Coleman v. Larson*, Wash., 95 Pac. Rep. 262.

113. **Street Railroads—Injury to Child on Track.**—In an action for the death of a six-year old child, caused by being struck by defendant's electric car, the submission of the cause to the jury on the theory of the humanitarian rule alone held erroneous.—*Gabriel v. Metropolitan St. Ry. Co.*, Mo., 109 S. W. Rep. 1042.

114. **Subrogation—Purchase of Mortgaged Property.**—A purchaser of land from a husband subject to a mortgage under a deed in which the wife did not join held entitled to be subrogated to the rights of the mortgagee under the mortgage, though it has been paid, as against the rights of the grantor's widow.—*Overturf v. Martin*, Ind., 84 N. E. Rep. 531.

115. **Sunday—Amusements.**—A moving picture exhibition is a "show," within Pen. Code, Sec. 265, prohibiting all exercises or shows on Sunday.—*Gale v. Bingham*, 110 N. Y. Supp. 12.

116. **Taxation—Property Devoted to Public Use.**—So much of a village electric light plant as was devoted to furnishing electric light to

other villages and their inhabitants held not exempt from taxation as devoted to a public use.—*Village of Swanton v. Town of Highgate*, Vt., 69 Atl. Rep. 667.

117. **Tax Sale.**—Where the owner of property sold at a tax sale moves to deny confirmation for inadequacy of price and offers to increase the bid on resale, he admits the jurisdiction and confesses the justice of the decree of sale, and is estopped to dispute either.—*State v. Several Parcels of Land*, Neb., 116 N. W. Rep. 40.

118. **Telegraphs and Telephones—Municipal Corporations.**—The right of a city to control a telephone company within its limits results from statute, and not from the ordinance or action of local authorities by which the consent is given to the company to operate a line in the city; and a consent once given cannot be revoked.—*Missouri River Telephone Co. v. City of Mitchell*, S. D., 116 N. W. Rep. 67.

119. **Torts—Acts Constituting Breach of Duty.**—The principle stated, giving a right of action ex delicto to the injured party for the violation of a duty arising out of a breach of contract, or resulting from a status between the parties.—*Graff v. Lemp Brewing Co.*, Mo., 109 S. W. Rep. 1044.

120. **Trover and Conversion—Measure of Damages.**—If defendant in converting a growing crop had no reasonable ground to believe it was his, the owner's measure of damage was the value of the property at the time it was converted, without any deduction for any labor bestowed upon it by defendant.—*Ayers v. Hobbs*, Ind., 84 N. E. Rep. 554.

121. **Persons Liable.**—One who aids in the wrongful taking of chattels is liable for the conversion thereof, though he acted as agent.—*Starr v. Bankers' Union of the World*, Neb., 116 N. W. Rep. 61.

122. **Waters and Water Courses—Duties of Water Commissioner.**—It is not the duty of a water commissioner to make any division or distribution of water between the users thereof from the same ditch, and he has no authority to interfere with the internal management of the affairs of a ditch company.—*Cache La Poudre Irrigating Ditch Co. v. Hawley*, Colo., 95 Pac. Rep. 317.

123. **Rights of Riparian Proprietors.**—There is no priority between the rights of riparian proprietors to the water of a nonnavigable stream, but their rights are equal, regardless of location on the stream or the date of acquiring their title.—*Williams v. Altnow*, Or., 95 Pac. Rep. 200.

124. **Wills—Contingent Remainders.**—Where a testator left property to his unmarried daughter with the provision that, upon her death, it should pass to her issue, if she should leave issue living at her death, no present interest passed to her children under the will, but the remainder created was a contingent one.—*Janette v. Bell*, Ky., 110 S. W. Rep. 298.

125. **Land Subject to Legacies.**—Where land, live stock, and farming tools were bequeathed, charged with the payment of legacies, and the land was subsequently conveyed to one who as a part consideration therefor covenanted to pay the legacies according to the provisions of the will, the charge on the mixed property as against him and those claiming under him was made to rest primarily on the land in exoneration of the personality.—*Warren's Admr. v. Bronson*, Vt., 69 Atl. Rep. 655.

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IS A CAUSE OF ACTION FOR DIVORCE AFFECTED BY REPENTANCE AND PROMISES OF REFORM ON THE PART OF THE WRONG-DOER?

Many students of our domestic institutions believe that our laws relating to the dissolution of the marriage relation are altogether too liberal. In many respects this charge seems to be fully justified.

One of the rules of law affecting legal separation, which has excited criticism from laymen, is that which refuses to enforce condonation on the part of the injured party, when the other party is sincerely repentant. We have an illustration of this rule in the recent case of *Bovaird v. Bovaird* (Kans.), 96 Pac. 666, where it was held that while the law encourages reconciliation and the resumption of marital relations between estranged spouses, it does not enforce condonation nor require that a wife who declines to live with a husband, who has been guilty of adultery and other matrimonial offenses, shall herself be deemed guilty of desertion.

In the principal case the husband who admits that he is guilty of adultery, states that after the commission of his misconduct he was sincerely repentant and has begged his wife to forgive him. He fixed up a home, and in good faith wrote his wife, asking her to return, which she refused to do and he brings suit for desertion. The wife files a cross-bill, alleging the husband's adultery and asking for divorce and alimony.

There are two aspects to this case, first, the husband's right to a divorce, second, the wife's right to divorce. The former must, of course, fail. The husband is not an innocent party. Moreover, the commission of the act of adultery justifies the other in abandoning the matrimonial domicile.

What effect, however, do protestations of repentance and reformation have on the cause of action that has already accrued in favor of the wife. In cases of desertion,

the husband is expected ordinarily to ask his wife to return to him before he can charge her with desertion. And his sincere appeal for her to come to him will, even where his action caused her to leave, prevent his absence from amounting to a desertion. *Albee v. Albee*, 141 Ill. 550, 31 N. E. 153.

As to all other causes for divorce, it would seem, although we have not been able to discover any authorities to that effect, that no offer of reconciliation or no protestations of repentance, no matter how sincere, neither show of moral excuse nor amounting to a legal excuse, will be effective to prevent a legal separation. In the case of *O'Neill v. O'Neill*, 30 N. J. Eq. 119, it was held that no assurances of repentance nor any promise of reformation will avail as a defense to a suit for divorce on the ground of cruelty. We have discovered no decided case involving the effect of repentance on an application for divorce on the ground of adultery and therefore the principal case referred to may be considered as establishing the rule in reference to marital offenses of that nature.

The courts, however, should be careful not to push this rule too far or to state it in terms of unbending rigidity. Instances might be cited where trial courts have refused a divorce, with good results, where the guilty party gave evidences of sincere repentance and reformation. Such courts have often been condemned by members of the bar who are inclined to insist upon the letter of the law, but fail to see the immense advantage to society and unborn children, when such reconciliations are effected. In such cases, courts usually are and should be "inclined to encourage reconciliation and the resumption of marital relations between spouses who are estranged," as the court well says in the principal case; and in view of the importance of this consideration, no hard and fast rule should be adopted, but trial courts should be granted a certain discretion to refuse absolute divorces, at least for a tentative period in all such cases where a reconciliation is possible, and be permitted to use their good offices to bring about such a consummation.

NOTES OF IMPORTANT DECISIONS

STREET RAILROADS—CARE REQUIRED TO PREVENT COLLISION WITH FIRE DEPARTMENT APPARATUS.—That the apparatus of the fire department when proceeding to a fire have the right of way over all vehicles on the public highway is well settled. But the recent case of *Dole v. New Orleans Railway & Light Co. (La.)*, 46 South. 929, extends the rule to such apparatus whether proceeding to a fire or not.

Thus in the case cited the plaintiff, a hose cart driver, having been ordered to hitch the engine horses to the hose wagon and take them to be shod, complied with the order to the extent that (he and the pipeman), having hitched up the horses, he took his position and strapped himself on the driver's seat. The pipeman (Ziemer by name) pushed open the doors, and, following them as they opened, went forward to the track, and raised his arms as a signal to the approaching car, whereupon plaintiff, whose view of the car was cut off by the open door upon his left, assuming that the car or any approaching vehicle would thereby be stopped, allowed the horses, which were prancing or jumping, to move forward, obliquing them slightly to the left as they cleared the doors, with a view of reaching the blacksmith shop by going in that direction. He then discovered that a car was coming very rapidly on the down track, and was threatening a collision, to avoid which he pulled the horses to the right in the hope of being able to get the wagon on the street between the track and the curb, and had partly succeeded in so doing when the car struck the left hind wheel of the wagon and occasioned the injuries to the driver which he complained of in his petition.

In affirming a judgment for plaintiff the court said: "Plaintiff acted upon the supposition that Ziemer's signal to stop meant the stopping of the vehicle signaled to, and that, receiving no warning that it was not producing that effect, it was safe for him to drive on. It would have been more prudent no doubt for him to have waited until assured of the result of the action taken by Ziemer, but he was not legally at fault in failing to do so, since the action so taken should and would have stopped the car but for the negligence of the mortorneer. It being important that the apparatus for its extinguishment should reach a fire promptly, and the men and horses of the fire department being expected and trained to use the utmost expedition for the accomplishment of that result, the requirement that individuals and vehicles engaged upon

less pressing missions shall not only accord them the right of way, but should hold themselves in readiness to do so when they have reason to anticipate that the fire engines or hose carriages may appear, is not unreasonable, and that condition exists when a vehicle, more particularly a car, which is confined to its track, approaches a fire engine house situated in close proximity to such track."

The point in this case, however, that aroused our interest was the fact that in this case plaintiff was not going to a fire, and there was no occasion for him to have proceeded at more than usual and ordinary speed. This point is in the brief expression of dissent of Prevosty, J., where he says: "As plaintiff was not going to a fire, but simply to have the horses shod, and there was no necessity for his rushing out upon the track, I think that his doing so was contributory negligence on his part barring recovery."

It would seem that the extraordinary immunity from contributory negligence which is thrown around those who operate fire department apparatus proceeding to a fire should not apply when the emergency which creates the necessity for such immunity does not exist. In the principal case the evidence showed that the men in charge of the hose cart saw the rapidly approaching car, but took no further precaution than to raise the hand and shout to the motorman before driving deliberately upon the track. We are inclined to agree with Judge Prevosty that this constituted such contributory negligence as would preclude a recovery.

THE BREACH OF AN UNCONDITIONAL CONTRACT BETWEEN A SHIPPER AND A CARRIER TO TRANSPORT AND TO DELIVER AN EMERGENCY SHIPMENT AT A SPECIFIED DESTINATION BY A STATED TIME IS NOT EXCUSED BY INEVITABLE ACCIDENT OR NECESSITY, AND SUCH UNCONDITIONAL CONTRACT IS NOT ABROGATED BY OR MERGED IN A WRITING SUBSEQUENTLY MADE, PURPORTING TO WAIVE SUCH CONTRACT, WITHOUT A NEW AND INDEPENDENT CONSIDERATION.

It would be idle to endeavor to find a solution of the legal propositions suggested by the above caption, in the modern decisions, for it must be apparent to any lawyer, who has given these questions serious thought, that the recent court conclusions,

involving them, are out of harmony with each other, and with fundamental legal doctrines. A correct solution, therefore, must be deduced from first principles.

The duties of common carriers under the common law are reasonably well understood by judges and lawyers, but it is often assumed that the common law rules no longer hold good. This is a mistake—especially when applied to interstate transactions. There has been some legislation by congress, and some state legislatures, affecting the carrying business, but this, in so far as it amounts to anything, has been but declaratory of the common law, and an attempt to mould the common law into statutory form. The law always has been and still is that common carriers shall be obliged to carry all things properly offered for carriage, within the class of the things which such carriers make a business of transporting. It is further the duty of such carriers to do such carrying at a uniform and reasonable rate, and without discrimination in any respect, and to complete the carriage and make safe delivery within a reasonable time. A failure to do any or all of these things, unless brought about by some of the well-known excepted causes, subjects such carriers to liability for damages occasioned by such failure, not as an insurer, or by reason of any obligation assumed by contract, *but in tort*, as for breach of legal duty. If the loss is occasioned by reason of one or more of the legally recognized exceptions—such as the act of God, act of the public enemy, etc., there is no liability, because then there is no breach of law-imposed duty. In no sense can it be said that the relation between shipper and common carrier, as such, with respect to shipments are contractual. To make a contract many things must concur: there must be contracting parties, who have capacity to enter into reciprocal stipulations, and both parties must be in a position to make and reject propositions for contracting; there must be a lawful subject matter, and there must be a lawful consideration. It is obvious that a common carrier as such,

when shipments are properly offered for carriage, has no alternative but to accept the things for shipment and make the transportation. Neither has it the power to make any conditions or stipulations with reference to facilities of transportation or the rate to be charged for freight, nor to grant extra facilities or special privileges with any shipment.

But the common carrier system, recognized by the law is a union of two things: A public facility (a highway), with private property—or a union of a public service or function, with a capacity for any private enterprise not inconsistent with such public service or function. A common carrier may, under certain circumstances become a *private* carrier and as such make contracts with reference to carriage, namely, in reference to emergency shipments. A common carrier may become a private carrier for the purpose of carrying those things which by reason of their nature necessity has excepted from the class of usual carriage, such as highly explosive and dangerous materials, wild animals, which need special care, a circus menagerie, and things and shipments of like character.¹ And it may also become a private carrier, and so a contractor, with respect to shipments which are to be delivered at a specified destination at a particular time, or where the shipment is to be made in any unusual or peculiar manner. . . . In short where the shipper, by reason of the proposed contract of shipment, secures lawful advantages or consideration which he could not demand as a matter of right from a *common* carrier. But a common carrier cannot so assume to act in a private capacity, and bind itself or the shipper by contracts the effect of which would be to hamper its public duties, or would result in discrimination.

A common carrier cannot enter into a valid private contract with respect to the

(1) Chicago, Milwaukee & St. Paul R. Co. v. Wallace, 66 Fed. 506; C. & St. Louis R. Co. v. Ketcham, 19 L. R. A. 339; Forepaugh v. Del., L. W. R. Co., 128 Pa. 217.

shipment of things which from the nature of its business it is bound to transport as a matter of law-imposed duty. Within the limitations above stated it may, according to some authorities,² assume greater obligations with respect thereto than those which the law imposes upon common carriers, but an instance could hardly be conceived of which would not border on discrimination. Public policy forbids the public functionary, the common carrier, to contract away its general duties. But, perhaps, it does not forbid an extension of them, when this does not interfere with its duties, as a public functionary. If such duties can be so extended by contract, it can be validly done only when there is a proper consideration.

Under any circumstances which render valid a contract with reference to a shipment, between shipper and carrier, the carrier must necessarily act in a private capacity, and not as a common carrier or public servant, for the very nature of a contract calls into action characteristics which a public functionary as such does not possess.

Long before the well known decision in the case of *New York Central Ry. Co. v. Lockwood*,³ and ever since that time, the question as to the validity or invalidity of shipping contracts has been the theme of judicial disquisition. These contracts have been in part or altogether upheld by some courts, and they have been criticised in no very unmeasured terms by others, and strange as it would seem, the simple reason for holding them either void or valid has never been clearly stated.

In speaking of a usual livestock shipping contract, the Supreme Court of the United States in the *Lockwood* case says:

"The carrier and his customer do not stand on a footing of equality. The latter is only one individual in a million. He cannot afford to higggle or stand out and seek redress in the courts. His business will not admit of such a course. He pre-

fers, rather to accept any bill of lading, or sign any paper the carrier presents; often indeed, without knowing what the one or the other contains. In most cases he has no alternative but to do this, or abandon his business. . . . If the customer had any real freedom of choice, if he had a reasonable and practicable alternative, and if the employment of the carrier were not a public one, charging him with the duty of accommodating the public, in the line of his employment; then, if the customer chose to assume the risk, it could with more reason be said to be his private affair, and no concern of the public. But the condition of things is entirely different, and especially so under the modified arrangement which the carrying business and trade has assumed. The business is mostly concentrated in a few powerful corporations, whose position in the body politic enables them to control it. They do in fact control it, and impose such conditions upon travel and transportation as they see fit, which the public is compelled to accept. These circumstances furnish an additional argument, if any were needed to show that the conditions imposed by common carriers ought not to be adverse, to say the least, to the dictates of public policy and morality. The status and relative position of the parties render any such condition void." No one can say anything against the statements contained in the part of the opinion of the court here quoted, but it would have been better, in view of what has been held by courts since this decision, had the court simply declared the contract in that case void on the plain ground that to uphold it would permit the common carrier to become a private carrier in respect to a shipment of the usual character, and in no manner falling within the class in regard to which a private contract might or could be made by the carrier in that case.

Many attempts have been made by shippers, after iron-clad shipping contracts had been signed by them, to avoid the effect of the stipulations contained therein, by show-

(2) Elliott on Railroads, sec. 1,456.

(3) 84 U. S. 357.

ing that fraud had been practiced upon them in procuring their signatures thereto. In some cases this has been successfully established. In others this effort has failed, and then because of an erroneous assumption on the part of courts, that fraud was the only vice which would overthrow such contracts, they have upheld them without mentioning any of the other vital grounds which would vitiate them, and thus established precedents fruitful of egregious error. Still other courts, (very properly, so far as that is concerned), refused to permit parties to be relieved from such contracts because they negligently failed to read them before signing, but in all such cases, either because the question was not raised, or because such courts were inexcusably ignorant, these so-called contracts were held valid, when, clearly, the purported contracts should have been held void because the shipment involved was of such a nature that no private contract could have been made in reference to its transportation by a carrier, whose duty it was to carry it as a public or common carrier and any waivers or further stipulations were without consideration.

In all cases where a carrier agrees to deliver a given shipment at a particular point, by a particular day, to meet a particular emergency or for any valid cause, it does so as a private carrier. Under such circumstances the law imposes no special burdens or duties any more than it does on any other private contractor. All the obligations which the carrier owes under these conditions flow from the contract. The contract which provides for a delivery of the shipment at a given place, at a given time must be carried out, or the carrier is guilty of a breach of the contract and it must respond in damages occasioned thereby, and it makes no difference whether the failure is due to some default of the carrier or to inevitable accident, or an act of God, or some other cause, not brought about by the agency of the shipper. This liability does not exist because of some implied contract of insur-

ance, but it exists because of the contract of carriage. Of course, a carrier may exempt itself from liability under such special or private contract by express stipulation, the same as any other contracting party might do, but unless this is done the contract must be carried out according to its terms.

Many cases exist which abundantly sustain this proposition, but it is not always fully stated why an act of God or inevitable necessity is not an excuse in such cases, or why, if the law imposes the duty, a different rule prevails. This distinction becomes more obscure, in railroad cases, from the almost universal mistake on the part of the courts, in treating the ordinary relation between shipper and carrier as a contractual one, and then, illogically, to apply the exceptions appropriate and peculiar to the common law relation. From such misconception and confusion of contract, tort and legal rules is begotten and brought forth a monstrosity, which is pretended to be a law implied qualification. By this they would impair the obligation of an unqualified contract when a contractual relation actually does exist.

A fair sample of what is here referred to may be found in the case of *Neal v. Sanderson*.⁴ In this case it was claimed that because the bill of lading contained no exceptions in regard to the usual dangers of the river, that therefore the carrier was liable for a loss occasioned by such usual dangers. This is said by the court: "It is however insisted that nothing will excuse the defendant, because by his contract, he took all risks, even those which might arise from inevitable accident. This is assumed on the ground that the bill of lading does not contain a clause excepting the dangers of the river, and the absence of such exception is construed as a contract to deliver at all events. It is usual for carriers by water to except the dangers of the rivers or of the seas, in express terms, this has the effect to exempt them from losses arising, not only from natural causes,

but from accidents which are usually considered as peculiar to the river or the sea, . . . but it is said if the phrase, perils of the sea "excepted," is to be used only in its limited sense, as denoting only accidents from natural causes, peculiar to that element, then there is no use for the exception in the bill of lading, as common carriers are excused by law from losses by such accidents. If then, the bill of lading had contained the usual exceptions, it would seem that it would have been useless, when exemption from loss is claimed on the ground of inevitable accident. This is necessarily the rule. The law of the contract is part of the contract, and in the absence of express stipulation the law governs. It is not to be presumed that the party undertook beyond the terms of his contract. His silence is not to be construed into an engagement to do more than the terms of his contract and the law required. The law engrafts on the contract a condition that the carrier shall not be responsible for inevitable accidents, and nothing but an express undertaking will dispense with this condition—"Words clothed in reason's garb"—"Vain wisdom all and false philosophy." The result of this decision was undoubtedly correct. It was a shipment under the strict terms of the common law, and, of course, an inevitable accident, or an act of God, is a complete defense in common law shipments when this is the proximate cause of a loss. The bill of lading was not a contract. It was a receipt. Stipulations in it did not constitute a contract of carriage. It could not have been a contract of carriage for the simple reason that the shipment was not of such a nature that a private contract could be made in reference to its transportation, and obviously there was no consideration for the special undertakings claimed. The law does not engraft on any contract conditions not expressed. The act of God was a defense in this case, because it was a common law shipment, and under it the carrier had broken no obliga-

tions—had committed no tort, and therefore was not liable.

There are many cases like the above, but it is not necessary to mention them. The trouble with them is that they are erroneous. The only sensible thing to do is to ignore them, start anew, with legal reason and logic as a guide. The law is, as above stated, that a carrier may, under the circumstances indicated, by special contract, assume liabilities so as to be answerable for loss or damage for which it would not be accountable as a common carrier. Emergency shipments can be made only under contract, and then only when they do not interfere with the public function.⁵

The general rule is stated in *Elliot on Railroads*, as follows: "Where there is an express contract to carry and deliver in a specified time, and no limitations or qualifications therein, it is held that the carriers cannot make available defenses, founded upon causes arising from, what is termed: "the act of God."⁶

In *Harmony v. Bingham* the Supreme Court of New York holds: "A carrier is liable on his express contract to deliver within a specified time, notwithstanding that the delay of which the plaintiff complains was caused by inevitable accident."⁷

In *School Dist. No. 1 v. Dauchy*⁸, it is said: "The defendant insists that where the thing contracted to be done becomes impossible by the act of God, the contract is discharged. This is altogether a mistake . . . The law never creates or imposes on any one a duty to perform what God forbids, or what he renders impossible of performance, but it allows people to enter into contracts as they please, provided they do not violate the law, and when they do this such contract must be carried out."

The case of *Tompkins v. Dudley*⁹ is a

(5) *Gunther v. Barnett*, 2 Brev. (S. C.) 488.

(6) *Elliott on Railroads*, 2d Ed., sec. 1,456; *Miller v. Chicago, etc., Ry. Co.*, 1 Mo. App. 474; *Angell on Car.*, sec. 294.

(7) *Harmony v. Bingham*, 12 N. Y. 99, 62 Am. Dec. 142, and exhaustive monographic note.

(8) 68 Am. Dec. 371.

(9) 82 Am. Dec. 349, (N. Y.).

leading case on the question here discussed. This is said in the opinion: "If a party by his own contract lay a charge upon himself he is bound to perform the stipulated act, or pay damages for its non-completion, unless the matter was at the time manifestly impracticable." And at another place in the same opinion it is said: "The act of God will excuse the not doing of a thing where the law created the duty, but never where it is created by positive and absolute agreement of the party." . . . "And when one of two innocent parties must sustain a loss, the law casts it upon him who agreed to sustain it, or rather, it leaves it where the agreement of the parties has put it."

Another well-known case is *Adams v. Nichols*¹⁰ which states the law as follows: "Where the law imposes a duty upon any one inevitable accident may excuse its non-performance; for the law will not require of a party what without any fault of his he becomes unable to perform, but where the party, by his agreement, voluntarily assumes or creates a duty or charge upon himself, he shall be bound by his contract, and the non-performance of it will not be excused by accident or inevitable necessity."

Many other cases, mostly old ones, it is true, could be found and referred to, but those mentioned are sufficient to show that there is respectable authority as well as sound reason for the matters herein contended for. It will be said, perhaps, that some of the cases referred to do not involve shipments, and therefore do not affect railroad cases, but no good reason can be shown, for none exists, why contracts should not be just as solemn and binding when a railroad is involved as when it affects a private individual. It has been pointed out that the contract here under consideration has nothing whatever to do with the idea of common carrier. If the shipment assumed was one which must be handled by a common carrier as such, the contract referred to could not exist.

It often happens that when after a valid special or private contract such as above discussed has been entered into, and acted upon, before the actual transportation begins, a shipping contract, entirely shifting the risk is procured to be signed by the shipper, as a matter of fact, as said in the *Lockwood* case, already referred to, this is often the only alternative the shipper has, if he does not want to abandon his business, and then it is claimed that such writing controls the shipment. Such so-called contract usually contains the statement that it is made in consideration of a reduced freight rate. Here again the absurdity and inconsistency of the court decisions becomes painful.

From what has been said against the validity of contracts between common carrier and shipper, it must not be understood that it is claimed that written contracts, however favorable to the carrier, cannot be made in all cases where a valid oral one, in relation to emergency shipments might be or has already been made, but it is claimed that where an oral contract has been properly made, under which the carrier has bound itself to deliver a given shipment at a given point, at a stated time, the effect of which operates as an absolute indemnity to the shipper against any loss or damage, this advantage is not lost simply because the shipper has signed or received a paper, (for which he gets nothing that he was not already entitled to under the oral contract), purporting to release the carrier from its obligations already assumed, and in which the shipper purports to assume many things which he did not owe before, for which the carrier pays nothing. If the usually *claimed* consideration—a reduction in freight rate, (and this cannot be the law-made rate, but that already agreed upon under the previous oral contract), existed, however slight the reduction, or any other advantage to the shipper so secured, this would be sufficient. But it is generally shown, and could be made to appear in all cases, that no freight reduction is ever in fact offered or obtained.

It invariably appears that the carrier neither obligates itself to do, nor as a matter of fact ever does anything under these written contracts which it did not already owe, in common carrier shipments by force of the law, and in private or emergency shipments by force of previous contract.

In shipments controlled by the common law a reduction in freight rates, if it actually existed, would be unlawful, and in such cases the contracts are wholly void, for many reasons, but chiefly for want of consideration. Thousands of courts have held that a rate reduction, in shipments which must be handled under the common law rules, is a good consideration for such special contract, full of waivers by the shipper. These are all wrong, and useless lumber in the law-books. This must be apparent from the recent decision of the Supreme Court of the United States in the case of *Texas & Pacific R'y Co. v. Mugg and Dryden*,¹¹ to the effect that a contract in reference to an interstate shipment, between shipper and carrier, stipulating for a lower rate than the by law established rate is illegal and not binding on the carrier. It is to be hoped that this decision will put the courts *right* on *that* score, at least.

In some cases courts have upheld the limited liability railroad shipping contracts in writing, where valid oral agreements had been fully entered into in reference to the shipments in question, on the theory that the oral contract had in some way become *merged* in the written contract.

"Gegen Dummheit kämpfen Götter selbst vergebens." (Against ignorance the gods themselves contend in vain).

It is certainly true that previous or contemporaneous oral *negotiations*, between contracting parties, who have reduced their agreements to writing, as a matter of legal rule, are considered as merged in the writing. (But another way of saying that the writing is the best evidence of what the parties did say, negotiate and agree

upon by word of mouth, before they finally reduced their matter to writing.) An inferior estate may merge in a superior title, as, for example, a mortgage interest is sometimes swallowed up in a subsequently acquired estate in fee, by the same person becoming possessed of both. But how can a full-fledged contract be abrogated, merged, and swallowed up, without consideration to one entitled to benefits thereunder? Oral *negotiations* may merge, in the sense implied in the legal rule, but not so oral *contracts*. For most purposes, oral contracts are of equal dignity and binding force with written ones. It is freely conceded that parties may enter into new and different dealings, and each releasing the other from the obligations of the already existing contract, as consideration would be sufficient. And then, of course, they might proceed anew to make another contract, either written or oral. The fallacy is chiefly in the assumption that the performance by the carrier of, or its agreement to perform a part of the things due under the oral contract, without anything additional being paid or assumed by it, can be treated as a valid consideration for the new contract, the waiver by the shipper of all his vested rights under the first contract, and the assumption of many additional burdens by him. In no case does the shipper ever get anything by reason of the second purported contract, which he is not already entitled to under the first oral contract.

"It is well settled that an agreement to do, or the doing of that which one is already bound to do does not constitute a consideration for a new promise."¹²

If lawyers would insist upon and courts uphold the law as it now actually stands,

(12) *Schuler v. Myton*, 48 Kansas, 282; *Railroad Co. v. Reynolds*, 17 Kansas, 255; *Wehman v. Minneapolis, etc., R. Co.*, (Minn.), 59 N. W. 546; *Lake Erie & Western R. Co. v. Holland* (Ind.), 63 L. R. A. 948; *Rosenfeld v. Peoria D. & E. R. Co.*, 103 Ind. 121; *German v. Chicago & N. W. R. Co.*, 38 Iowa, 127; *McFadden v. Mo. M. T. R. Co.*, 92 Mo. 241; *Illinois Cent. R. Co. v. Ins. Co.*, 30 So. 43; *Fountain v. Wabash R. Co.*, 90 S. W. 393; *Summers v. Wabash R. Co.*, 79 S. W. 481; *Ficklin v. Wabash*, 93 S. W. 847.

in reference to transportation cases, much of that which now agitates the political field, and the halls of legislation would be eliminated, and much of wild and ill-adapted legislation would be avoided. Injustice has often resulted, not because of want of law, but because of want of discrimination in its application.

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CRIMINAL LAW—STAY OF EXECUTION.

Ex parte COLLINS.

Court of Appeal, Second District, California.
June 18, 1908.

Unless otherwise provided by law, the court has inherent power to stay execution in a criminal case, and such power, being exercised for the benefit of the defendant, will be presumed to have been with his consent.

While a defendant sentenced to a term of imprisonment is entitled to immediate incarceration thereon, yet if he does not object to the suspension of execution by the court, the judgment during such suspension remains unexecuted, and he may not thereafter object to his incarceration thereunder.

TAGGART, J.: On June 1, 1907, Herbert L. Collins pleaded guilty to a charge of vagrancy, waived time for sentence on the charge, and a judgment of imprisonment for the term of six months in the county jail was rendered and entered against him thereon. The judgment was not executed at the time. The justice of the peace before whom the proceedings were had merely made an entry in his docket of "commitment withheld," and allowed the defendant to have his liberty. On February 29, 1908, a commitment in execution of said judgment was issued by the justice, and by virtue thereof the sheriff took the defendant into custody, and confined him in the county jail. It is from this confinement his release is sought. Application for such release was made to the superior court of Kings county, in which county defendant was confined, and after a hearing his application was denied. It was thereupon renewed in this court.

Both demurrer and answer to the petition are presented upon the return. Only one issue of fact is raised by the latter, and no evidence was offered by either party in relation thereto. The petition alleges that at the time the order was made withholding the commit-

ment the defendant was present in court, and ready and willing to surrender himself in execution of the judgment. The answer denies that he was ready or willing, but avers that he was present, and consented to the making of the order. It appears from the declarations of the courts in some jurisdictions that at common law it was competent for a court, having the authority to imprison as a penalty for crime, to make an order staying execution, and the power to do this is held to be inherent in the court. The practice was recognized and followed in England, where there was no appeal, as a matter of right, from a conviction for crime. For this reason, it is said to follow that, unless otherwise provided by statute the power to stay execution exists in the court, and being exercised for the benefit of the defendant, will be presumed to have been done with his consent. *Weber v. State*, 58 Ohio St. 616, 51 N. E. 116, 41 L. R. A. 472; *People v. Court*, Monroe Co., 141 N. Y. 288, 36 N. E. 386, 23 L. R. A. 856.

The application of the rule *expressio unius*, etc., to the provisions of section 1203 of the Penal Code would justify a distinction between the exercise of the probationary powers of the court in suspending sentence and in staying execution after sentence. The suspension of sentence appears to be the general rule in cases in which the defendant is over 16 years of age, while suspension of execution of sentence appears to be restricted to sentences to pay fine with imprisonment in the alternative. This special provision for a stay of execution justifies the further inference as to the legislative intent to limit the power to specially provided cases. If the rule were applicable here, the absence of statutory authority would render the order, "commitment withheld," void. This same rule is invoked by the respondent in connection with the sections of the Code relating to stay of execution on appeal but we do not think it material to the question before us whether the order be void or not. It may even be conceded that the rule declared in those cases in which the plea of guilty or verdict of conviction has been entered, but no sentence imposed, to wit, that an agreement or condition that the defendant may remain at large unsentenced is void, and that the suspension of the sentence entered by consent is unauthorized (*Gray v. State*, 107 Ind. 177, 8 N. E. 16; *People v. Barrett*, 202 Ill. 287, 67 N. E. 23, 63 L. R. A. 82, 95 Am. St. Rep. 230), is applicable here, and the invalidity of the subsequent order staying execution be admitted for that reason, yet this would not avoid the original judgment (*Sylvester v. State*, 65 N. H. 193, 20 Atl. 954). It would still be valid, substituting unexecuted judgment. The time at

which a judgment or sentence shall be carried into execution forms no part of the judgment of the court. The judgment is the penalty of the law, as declared by the court, while the direction with respect to the time of carrying it into effect is in the nature of an award of execution. Where the penalty is imprisonment, the sentence of the law is to be satisfied only by the actual suffering of the imprisonment imposed, unless remitted by death or by some legal authority. The expiration of time without imprisonment is in no sense an execution of the sentence. *State v. Cockerham*, 24 N. C. 204; *Dolan's Case*, 101 Mass. 222.

Where the convicted defendant is at liberty and has not served his sentence, if there be no statute to the contrary, he may be rearrested as an escape, and ordered into custody upon the unexecuted judgment. 1 Bishop. New Crim. Proc. sec. 1384; *In re Shaw*, 31 Minn. 44, 16 N. W. 461; *Ex parte Vance*, 90 Cal. 208, 27 Pac. 209, 13 L. R. A. 574; *People v. Patrich*, 118 Cal. 332, 50 Pac. 425. Not only may the justice of the peace in such a case issue a commitment, but he may even be compelled to do so by mandamus in a proper case. *Mann v. People*, 16 Colo. App. 475, 66 Pac. 452. Says the Colorado court: "The judgment of conviction did not become void because the respondent failed to issue a writ of commitment. * * It is immaterial that more than 60 days had elapsed since the conviction. Graham was not in prison during that time, and the judgment could be satisfied only by his actual imprisonment for the adjudged period. The duty to issue the writ was mandatory."

Section 670 of the Penal Code of this state provides that the term of imprisonment fixed by the judgment in a criminal action does not commence to run until the defendant is actually delivered at the place of imprisonment, and that any time he is temporarily at large by any legal means must not be computed as part of the term. It was by the application of this section that it was held in *Ex parte Morton*, 132 Cal. 346, 64 Pac. 469, that a sentence to commence after the date of the delivery of the defendant at the place of imprisonment, if not within the provisions of sections 669 of the same Code, was invalid. If a person who has entered a plea of guilty, or who has been convicted of a crime, desires that his sentence shall begin, he can, if not in custody, compel the issuance of the commitment (*Mann v. People*, supra), or, if he be in custody, may have a writ of habeas corpus to direct his imprisonment upon such sentence, in the proper place, that his term may begin to run under section 670. If he be serving a sentence for a misdemeanor in the county jail, and be sentenced upon conviction of a felony, he is en-

titled to be removed to the state prison forthwith, by virtue of the requirement of section 1216, Pen. Code, to that effect. *Ex parte McGuire*, 135 Cal. 339, 67 Pac. 327, 87 Am. St. Rep. 105. While a comparison of section 1213 with section 1455 discloses an absence of the element of time in the provisions for the execution of a judgment under the last section, and the former shows a right of the defendant to immediate action by the sheriff, and it was upon this statutory right to be taken forthwith that the action of the court *Ex parte McGuire* was based, it is unnecessary in support of the court's action, to hold that any difference in the practice was intended by the legislature. There was a valid, subsisting judgment unexecuted against the defendant on the 20th of February, 1908. The record does not disclose that any objection was made by him to the suspension of sentence, or any effort to have the court execute the judgment. That he was ready and willing to have the sentence executed did not cause him to demand its execution, or to refuse to accept the benefits of the order now claimed to be void. The judgment being valid and the sentence unserved, the commitment of the defendant in execution of the judgment was a legal and valid imprisonment.

Writ dismissed and petition denied.

We concur: ALLEN, P. J.; SHAW, J.

NOTE.—*Power of Court to Indefinitely Suspend Judgment in a Criminal Case.*—A glance at the authorities will clearly dispel any doubt that this is a question on which the courts are in complete harmony. When it is observed that some courts have held that no court has power to grant a stay of execution (*Butler v. State*, 97 Ind. 373); others that such power is inherent in every court of record (*People v. Court of Sessions*, 141 N. Y. 288); others that it may stay execution at least to perfect appeal (*Parker v. State*, Ind., 23 L. R. A. 859), or to apply for a pardon (*Chitty's Crim. Law*, 1819, p. 532), or during term at which sentence was passed (*Weber v. State*, 58 Oh. St. 472); others that an indefinite stay of execution amounts to a pardon (*People v. Allen*, 155 Ill. 61); others that judgment and sentence must be imposed without delay (*People v. Morrisette*, 20 How. Pr. 118), and still others that the state may compel a court to execute sentence by mandamus (*Mann v. People*, 16 Colo. App. 475), we gain an idea of the dense clouds of confusion which still surround a correct application of the principles of law which govern questions of this character.

There is undoubted authority for the statement that at common law courts had the power to stay execution of sentence for certain purposes. 2 Hawk P. C., chap. 51, sec. 8; Forsyth, Trial by Jury, 193; 4 Crim. Law Mag. 730; Hale, P. C., 19, sec. 2; 4 Bl. Comm. chap. 31. Our examination of the cases on which these authorities rest, discloses the fact that in every case we have exam-

ined, the purpose of the suspension was either to permit an opportunity to obtain a pardon, or to secure further evidence or for some other definite purpose and for a time certain. In most of the cases at common law the suspensions were during the term for which the judgment was rendered, although Blackstone says in the citation above referred to, that "these arbitrary reprieves may be granted or taken off by the justices of gaol delivery, although their session be finished and their commission expired," but Blackstone himself significantly adds: "but this rather by common usage than of strict right."

There is no reason why mere "common usage" at common law and that against "strict right" should be followed blindly to its full extent in this country without some reason or principle demanding its acceptance. At the early common law, it should be observed, there was no right of appeal, and thus judgments were not subject to review and thus could not be held under consideration for a further time except by suspension of the judgment. And when it is observed that practically all of the instances of suspended sentences were in capital cases and were for the purpose of discovering further evidence to satisfy the mind and conscience of the court, a proceeding seldom necessary under modern practice, where a judge who is satisfied that the evidence is insufficient to convict, may direct a verdict of acquittal, we observe why such a right or power is unnecessary in furtherance of justice in this country, except within certain limitations.

American tribunals take such judicial powers as common law courts of record possessed, which do not conflict with our constitutional separation of the powers of government. It cannot be denied that some common law justices, as Sir Matthew Hale, assumed powers to reprieve and commute the sentences of prisoners convicted before them that could not be countenanced if assumed by courts in this country. They would constitute undoubted usurpation of the constitutional prerogatives of the executive.

With equal reason it may be said that the power to stay execution in any event cannot be denied to courts altogether for within certain limitations, which it may be difficult to exactly define, such power is clearly inherent and necessary to give them full control over their adjudications. Thus, it may be said that during the term at which a judgment is rendered, the sentence may be modified or stayed. *Bank v. Withers*, 6 Wheat. 106; *Wharton's Criminal Practice*, (9th Ed.), sec. 913. This was the full extent of the decision in the case of *Weber v. State*, 58 Ohio, 616. In such cases the matter is still "in the breast of the court" and subject to the court's further consideration.

Another very proper use of the right to stay execution for judicial purpose is to enable a defendant convicted for a capital offense to appeal his case and be heard. *Parker v. State (Ind.)*, 23 L. R. A. 859. The court in that case very well said that such a power was necessary to enable it to exercise its judicial powers, for if, said the court, they were compelled to entreat the governor to reprieve the defendant until they could hear his appeal, the court would not be independent of the executive and would, therefore, not be what the constitution intended them to be, an independent, co-ordinate branch of the government.

When we come to consider the right of the court to suspend indefinitely a sentence, which

it has imposed, after conviction or plea of guilty in a criminal case, we are in the thick of a bitter contest between the authorities. The leading modern authority in favor of the unlimited power of the trial court to suspend an execution in a criminal cause for a time certain or for an indefinite period is the case of *People v. Court of Sessions*, 141 N. Y. 288, 23 L. R. A. 856, 36 N. E. 386. This was an application by the state for a writ of mandamus to compel a lower court to proceed to judgment in a certain criminal case and pass sentence on the defendant. One of the peculiar and inconsistent arguments in this and a few other cases holding to the same rule is in the effort to distinguish between an indefinite stay of execution and a reprieve. Whether there is a distinction or not, the very cases and authorities at common law on which such courts base their right to exercise such a power invariably style such stays of execution as reprieves. Thus Sir Matthew Hale, who is the most strenuous supporter of this right to suspend sentence in criminal causes, says: "Sometimes the judge *reprieves* before judgment, etc.," 2 Hale P. C., chap. 58, p. 412. Blackstone also calls them "*reprieves*." And such they are, however embarrassing such designation of them may be to courts who desire to distinguish such powers from constitutional grants of power to the executive to reprieve and pardon. This same inconsistency is evidenced by the Indiana Supreme Court in the case of *Parker v. State (Ind.)*, 23 L. R. A. 859, overruling the case of *Butler v. State*, 97 Ind. 373. The Parker case is not an authority, however, for indefinite suspensions of criminal judgment, the decision in that case being only that the supreme court could stay execution in a capital case pending appeal. We regard a stay of sentence for such purpose perfectly justifiable in aid of the court's undoubted jurisdiction to hear appeals.

The leading cases in opposition to the doctrine that trial courts have any inherent right to indefinitely suspend a judgment in a criminal case is the case of *People v. Allen*, 155 Ill. 61, 41 L. R. A. 473, together with the splendid argument of Judge Cooley in the case of *People v. Brown*, 54 Mich. 15, 19 N. W. 571. In the Allen case Justice Wilkin said: "Our constitution confers the pardoning power upon the executive branch of the state government, and the governor alone can prevent the infliction of punishment after a legal conviction. Courts may undoubtedly set aside verdicts of guilty and grant new trials or arrest the judgment, but they have no power to allow the conviction to stand and at the same time defeat its operation by an indefinite postponement of sentence." In the Brown case we call attention to these wise observations of one of the greatest judges of the present age. Justice Cooley said: "That there may be no misapprehension on this point, it is only necessary to understand exactly what it was which the judge was requested to do. In terms it was to suspend sentence. Now it is, no doubt, competent for a criminal court, after conviction, to stay for a time its sentence; and many good reasons may be suggested for doing so; such as to give opportunity for a motion for a new trial or in arrest, or to enable the judge to better satisfy his own mind what the punishment ought to be (*Commonwealth v. Dowdican's Bail*, 115 Mass. 133); but it is not a suspension of judgment of this sort that was desired in this case, but an entire and

absolute remission of all penalty. In other words, what was requested of the judge was that he should take advantage of the fact that he alone was empowered to pass sentence, and by postponing indefinitely the performance of this duty, indirectly, but to complete effect, grant to the respondent a pardon for his crime. . . . No doubt, judges have done this sometimes, but this is no reason for asking for a repetition of the wrong: it is rather a reason for being specially careful, not to invite it, lest by and by it come to be understood that the power to pardon, instead of being limited to one tribunal, is confided to many, and that the pressures of influence and respectability may be as properly employed with a judge to prevent sentence, as many seem to think it may be with a governor to procure a formal pardon."

Other authorities holding that courts have no authority to suspend sentence, except as an incident to the review of the case or upon other well-established grounds already referred to are as follows: In re Webb, 89 Wis. 354, 62 N. W. 177, 46 Am. St. Rep. 846, 27 L. R. A. 356; In re Markuson, 5 N. Dak. 180; Mann v. People, 16 Colo. App. 475; Weaver v. People, 33 Mich. 290. Where no sufficient reason is given by the trial court there is no doubt of the right of the state to mandamus the lower court to proceed to judgment, and this has been so decided. Mann v. People, 16 Colo. App. 475.

The effect of an indefinite suspension of a judgment in a criminal cause on good behavior or for any other reason is the same as a discharge. Power over a prisoner is lost upon such suspension without recognizance and the court cannot subsequently sentence him or compel him to serve out the punishment for his crime. People v. Allen, 155 Ill. 473, 41 L. R. A. 473; In re Webb, 89 Wis. 354, 62 N. W. 177, 46 Am. St. Rep. 846, 27 L. R. A. 356. The reason for this rule, besides being founded on the fact that there is no right or power in the court to grant indefinite suspensions, is that indefinite suspensions are clearly against a sound public policy as they give to the court power to capriciously arrest or imprison citizens who perhaps many years before had been convicted of crime and since that time had made for themselves a name in business or society which could be instantaneously destroyed by the arbitrary action of the judge of the court which tried him.

JETSAM AND FLOTSAM.

UNFRUITFUL LAWSUITS.

Many men, level-headed enough about other things, seem to lose their wits entirely when they get tangled up in a lawsuit. In a case recently concluded in the German courts a Berlin business man paid out over \$900 to recover the value of a five-cent postage stamp, and now everybody is laughing at him because he didn't even get the stamp back. It seems as if this claimant had justice on his side, too; he had written a polite letter asking for an address and enclosing postage for reply. Failing to get an answer, he sued for the stamp.

The famous Missouri watermelon case was just as trifling and even more disastrous. The seed was planted on one farm, but the vine

crept through a crack in the rail fence and the melon grew on the other side. Both farmers claimed it, and instead of seeing the joke they went to law. To add to the puzzle of ownership an additional complication, the fence was on a county line, and a question of the jurisdiction, of course, was involved. The farmers bankrupted themselves without deciding the question of ownership. The melon worth about ten cents in the first place, had disappeared long before.

The Iowa case which concerned the identity of a red and white heifer calf, was equally disastrous, says the Chicago Tribune. It is said that subpoenas were issued for more than two hundred witnesses, who attended court after court and received their fees and mileage. The question of who owned the calf grew from a joke into a neighborhood tragedy. Perfectly honest men and women took the witness stand and swore against each other. So great was the puzzle that jury after jury was unable to agree, and no man knows to this day whether there were two spotted calves that looked just alike, or whether one man tried to steal the other's calf. After they had spent all their money in litigation the rival owners met one day and tossed a coin to settle the case.

How the costs run up in these trivial actions was shown in a Canadian case. By one of those queer marriage settlements sometimes made in England, a young man agreed to pay his wife's mother \$100 on the first day of every year. He settled in Canada, and when he came to make the remittance he deducted the amount of the money order and sent her only \$99.84. The mother-in-law insisted that she must have the other sixteen cents, and after a month or two she had her attorneys bring suit against him in the Ontario courts. She made him pay, too, and stuck him for the costs of the action, though she was obliged to fee her own lawyers. The total expenses of this sixteen-cent lawsuit were said to be exactly \$612, most of which fell upon the economical son-in-law.

One of the celebrated French cases was over a two-cent toy balloon, and the litigants were Baron de Sibert and the Paris Metropolitan Railway. The balloon belonged to the baron's little girl, and the railway employees, on account of some rule they felt obliged to enforce, would not permit it to be brought into the passenger car. The baron stormed and threatened, but the guard was obdurate, and the toy was left behind while the child wept. The next day the nobleman sued the company for the two cents.

Some of the smartest lawyers in Paris were engaged in the case. It was proved that the balloon was filled with gas, and that it was likely to explode at any time, and the wise court held that even if its explosion could not possibly be attended by danger, it might "create a panic among the passengers," and the decision was against the baron. He spent hundreds of dollars trying to get even with the company, and the more he lost the less satisfaction he obtained.

The most expensive lawsuit in the world is said to have been that over the will of Antonio Traversa, a merchant who lived in Milan. He left a fortune of \$3,000,000, and there were a large number of heirs with conflicting interests. The case was in the different courts of Italy for years and the 105 lawyers engaged in it ran up costs aggregating more than \$2,000,000. The estate lost in value, too, during the contest; so that the winning heirs found themselves with a small sum to their share when the final decision was rendered.

One of the most persistent complainants on record was an aged Belgian lawyer, who once tried to ride in an Antwerp street car, or tramway, on a ticket which he maintained was good but which the company refused to honor. He brought suit against them next day and the court decided against him. He paid his costs, only a trifle, and the next time he got on the car he offered the same ticket. It was refused, and again he haled the company into court.

As he was his own lawyer and the ticket was his witness, it was not an expensive course of litigation for him, but it cost the company something. As often as he would be thrown out of court he would offer the ticket again and establish grounds for a new case. At last the tramway company saw a great light. They accepted the ticket one day and let the lawyer ride.—Law Notes.

CORRESPONDENCE.

ALLEGATA ET PROBATA MUST CORRESPOND. VARIANCE IS FATAL.

Editor of Central Law Journal:

The following case presents some questions upon which I should like to have the views of such of your readers as are sufficiently interested to express themselves thereon in your correspondence column. The point was made by the plaintiff that the judgment of November, 1906, was beyond the jurisdiction of the court in this case because not authorized by the pleadings; that the pleadings, as expressed in 64 Central Law Journal, page 185, being the "foundation for the jurisdiction of the cause," no judgment could be given which was not based on appropriate allegations in the pleadings. The facts were: The complaint alleged that plaintiff, on April 20, 1897, executed a deed, absolute in form, conveying the land to the defendant; that the deed was intended to be a mortgage, or security merely, the defendant having agreed when it was made to so consider it, and that he would give plaintiff ten years from its date to pay the debt which it was given to secure. Plaintiff alleged further that he had made sundry payments to the defendant. He prayed a judgment decreeing the defendant to hold the land as mortgagee, and that he, plaintiff, be given credit for the payments he had made, as alleged in his complaint.

Defendant answered, merely denying the allegations of the complaint, admitting that he had received certain payments from the plaintiff, but alleging that said payments were made as rent for the property, the plaintiff, after the execution of the deed, having remained in possession. After the beginning of this suit the defendant secured possession of the land, and the plaintiff filed a supplemental complaint, setting up this change of possession after suit brought, and asking that the defendant be charged and plaintiff have credit, for the rental value during defendant's possession. There was no answer to the supplemental complaint. The defendant in his answer did not ask that the mortgage, if established according to the complaint, be foreclosed, contenting himself with standing on his prima facie title, as absolute owner, under the deed of April, 1897. In this state of the case judgment was entered by consent in May, 1906, that defendant held the land in trust to secure \$789 with interest from April 20, 1897, and, after the payment of that sum, in trust for the

plaintiff. The consent judgment did not adjudicate that the said amount was then due to the defendant, but was silent on that point, there being no finding one way or the other on the plaintiff's allegation that he was entitled to ten years from the date of the deed, April 20, 1897, to pay his indebtedness to defendant. The consent judgment of May, 1906, also adjudged that plaintiff was entitled to be credited on said \$789 "with the amount actually received by the defendant as rents upon said lands and one-third of crops raised on such parts of same as defendant permitted to be cultivated without charging rents therefor, with interest on said rent from the time they were received, less taxes paid by defendant on the land," and it was referred, "to ascertain the credits to which plaintiff is entitled under this order." It also directed that upon payment to defendant of "the sum due to him under this decree" the defendant should convey the land to the plaintiff, and that there "be no change in the possession of said lands until the further order of the court." The referee ascertained and reported the credits to which plaintiff was entitled under said consent judgment. The defendant then notified plaintiff that he would move for a "confirmation of the report, and that a judgment confirming the report would be presented to the court for its signature." Defendant did not move, or give notice of a motion, for a money judgment against plaintiff, or for a sale of the land. On this motion, over plaintiff's objection, judgment was rendered against the plaintiff for the \$789, less the credits ascertained by the referee, and that the land be sold unless the judgment was paid. Was this judgment within the jurisdiction of the court, under the pleadings, to render in this suit. Would not the case made by the pleadings have been completely disposed of by merely confirming the referee's report, and that being so, was not the court without jurisdiction to go beyond a complete disposition of the case made by the pleadings. Ought these questions not to be answered in the affirmative, if nothing further appeared in the case than has above been stated—ought they not a fortiori to be answered affirmatively when the plaintiff presented an uncontradicted affidavit, in opposition to the demand for a money judgment and sale, alleging that defendant had been continuously in possession of the premises from April 1, 1902, that after the filing of original and supplemental complaints defendant had committed waste on the property to plaintiff's damage \$500, many of the acts of waste—as affidavit alleged—being committed subsequent to the consent decree of May, 1906, and all of them after the filing of the complaints.

Asheville, N. C.

F. W. THOMAS.

We agree with Mr. Thomas.—(Editor.)

HUMOR OF THE LAW.

The couple were of the color of the ace of spades.

"You charge your husband with having struck you repeatedly with his flats?" asked the judge of the woman.

"Yes, your honor," she answered.

"Six months!" shouted the judge.

"These black hand outrages have got to cease!"—Lippincott's.

WEEKLY DIGEST.

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1. **Accident Insurance—Misrepresentations.**—A misrepresentation of a material fact in reliance on which a contract of insurance is issued avoids the contract, whether the representation was made intentionally and knowingly or through mistake.—*United States Fidelity & Guaranty Co. v. First Nat. Bank of Dundee, Ill.*, 84 N. E. Rep. 670.

2. **Accord and Satisfaction.**—Payment by Third Person.—Payment by a third person of a sum less than the amount due, in full satisfaction thereof, held a valid accord and satisfaction.—*Partridge v. Moynihan*, 110 N. Y. Supp. 539.

3.—**What Constitutes.**—Where a check is sent which is claimed to be in full payment of a claim, the receipt and retention thereof by the payee without objection is an accord and satisfaction of the claim.—*Rauh v. Wolf*, 110 N. Y. Supp. 923.

4. **Acknowledgment—Homestead.**—A mortgage of a homestead is void where the wife's separate acknowledgment was taken before one purporting to be a judge of a court created by an unconstitutional act of the legislature.—*King Lumber Co. v. Crow, Ala.*, 46 So. Rep. 646.

5. **Admiralty—Claims for Loss of Life.**—The law of France which authorizes recovery for loss of life against a vessel in fault will be enforced by the courts of the United States in a proceeding to limit liability for claims against a French vessel found to be at fault for collision in a fog on the high seas.—*Deslions v. La Compagnie Generale Transatlantique, U. S. S. C.*, 28 Sup. Ct. Rep. 651.

6. **Adverse Possession—Boundaries.**—An instrument not purporting to convey the lands therein described cannot be looked to for the purpose of extending one's possession to the boundaries of the lands.—*Mathews v. Tennessee Coal, Iron & R. Co., Ala.*, 47 So. Rep. 78.

7.—**Constructive Possession.**—The presumption of constructive possession cannot without evidence be extended to distinct lots held under different deeds, though the colorable title may be in the same person, nor to separate contiguous tracts of land described in the same deed.—*Hornblower v. Banton, Me.*, 69 Atl. Rep. 568.

8.—**Instruction.**—An instruction as to adverse possession, which omits the word "consecutive" before the word "years," in describing the length of time required to perfect title by adverse possession, is erroneous.—*Hayes v. Lemoine, Ala.*, 47 So. Rep. 97.

9. **Aliens—Burden of Proving Citizenship.**—Where the United States denied a Chinese person's right to enter, the burden was on him to prove such right, that he was born in the United States; there being no claim his alleged right rested on any other basis.—*Ex parte Loung June, U. S. D. C., N. D. N. Y.*, 160 Fed. Rep. 251.

10. **Animals—Fence Breaking Cattle.**—Where a person has a good fence, and another's cattle break through it, he has a right to shoot them to protect his crop.—*Huffman v. State, Tex.*, 110 S. W. Rep. 749.

11.—**Liability of Owner.**—The owner of a cow at large in a highway is not liable to a person injured by being thrown from a vehicle through her horse taking fright at the cow getting up when she tried to drive around it.—*Marsh v. Koons, Ohio*, 84 N. E. Rep. 599.

12. **Appeal and Error—Action to Abate.**—Where, in an action to abate a mill dam, the issues were submitted to a jury, the appellate court will not review the correctness of the decree where the evidence is not in the record.—*Edmondson v. McGinnis, Ala.*, 47 So. Rep. 62.

13.—**Directed Verdict.**—On appeal from a judgment, failure to renew a motion for a directed verdict at the close of the testimony, or to move for a directed verdict, precludes a review of a ruling on a motion for a directed verdict at the close of plaintiff's case.—*Landis Mach. Co. v. Komantz Saddlery Co., N. D.*, 116 N. W. Rep. 333.

14.—**Evidence.**—In a trial for aiding a national bank cashier in misapplying a stock

certificate held by the bank, any error in admitting the bank's minute book on the prosecution's part to show that it disclosed no record of the directors sanctioning the use of the certificate held harmless.—*Cook v. United States*, U. S. C. C. of App., Third Circuit, 159 Fed. Rep. 919.

15.—**Laws of Foreign State.**—Where the laws of another state, of which the courts could not take judicial notice were not proved at the trial, they could not be established on appeal by a citation of reports of decided cases by the courts of such state.—*Varner v. Interstate Exchange*, Iowa, 115 N. W. Rep. 1111.

16.—**Law of the Case.**—Where on a former appeal it was held that there was evidence to take the case to the jury, the decision was the law of the case on a second trial.—*International Boom Co. v. Rainy Lake River Boom Corp.*, Minn., 116 N. W. Rep. 221.

17.—**Misconduct of Counsel.**—A cause will not be reversed for misconduct of counsel where the attention of the trial court has been called to the misconduct and counsel duly admonished, unless it prejudiced the rights of the adverse party.—*Church v. Chicago, B. & Q. Ry. Co.*, Neb., 116 N. W. Rep. 520.

18.—**Overruling a Motion.**—Error in overruling a motion to exclude certain testimony of a witness on direct examination is not ground for reversal, where evidence brought out on the cross-examination of the witness affords the only foundation for obviating the effect of his evidence in chief.—*Union Naval Stores Co. v. Pugh*, Ala., 47 So. Rep. 48.

19.—**Arrest—Police Power.**—The city charter of Bessemer (Loc. Laws 1900-01, pp. 444-462, sec. 25), authorizing the city to empower police officers to make arrests with or without warrant, held not inconsistent with Code 1896, sec. 5211, authorizing arrests without warrant in cases of felony, but to extend the authority to cases of misdemeanor within the municipality.—*Childers v. State*, Ala., 47 So. Rep. 70.

20.—**Assignments—Conduct of Assignee.**—Act of assignee for benefit of creditors in giving purchaser from him of property belonging to the assignor's estate guaranty to furnish buyer of the property from the purchaser at a certain price held to place assignee in antagonism to the estate.—*McCord v. Nabours*, Tex., 109 S. W. Rep. 913.

21.—**Associations—Action Against Members.**—One suing the individual members of an unincorporated association held required to prove facts sufficient to make out a cause of action against the association.—*Barasch v. Reimer*, 110 N. Y. Supp. 1053.

22.—**Attachment—Service of Process.**—Personal notice to an absent defendant of an attachment of his real estate implies more than casual information of the suit or of the seizure of his property, but it relates to his receiving or learning of the copy of the writ that he is entitled to have left him.—*Wade v. Wade's Adm'r*, Vt., 69 Atl. Rep. 826.

23.—**Attorney and Client—Authority of Attorney.**—An attorney for two tenants in common, who adds the name of the third tenant as plaintiff in an action to recover for a trespass on the common property, cannot be compelled under Civ. Code 1896, sec. 594, to

prove his authority to act for such third tenant.—*Union Naval Stores Co. v. Pugh*, Ala., 47 So. Rep. 48.

24.—**Insulting Judicial Officer.**—Where an attorney wrote a personal letter to the chief justice of the supreme court, impugning both the intelligence and the integrity of said chief justice and his associates, he was guilty of professional misconduct for which he will be suspended.—*State Board of Examiners in Law v. Hart*, Minn., 116 N. W. Rep. 212.

25.—**Bankruptcy—Change of Domicile.**—A bankrupt under guardianship having changed his domicile with the guardian's consent to Vermont and resided there for more than six months, bankruptcy proceedings were maintainable in the district of Vermont, though the guardianship and insolvency proceedings were pending against him in New Hampshire.—*In re Kingsley*, U. S. D. C., D. Ver., 160 Fed. Rep. 275.

26.—**Chattel Mortgages.**—Where a trustee was not required to perform a contract of conditional sale of a corn popper to the bankrupt, but sold the same with the other property en masse, he was not authorized to pay the balance of the price without an order of court on notice.—*In re Grainger*, U. S. C. C. of App., Ninth Circuit, 160 Fed. Rep. 69.

27.—**Claims.**—Where a bankrupt for a valuable consideration assumed the payment of certain notes, his estate was liable for the entire debt, notwithstanding the holder might also have enforced payment against another.—*In re Girvin*, U. S. D. C., N. D. N. Y., 160 Fed. Rep. 206.

28.—**Claims.**—A court of bankruptcy has no jurisdiction under Bankr. Act, ch. 541, sec. 57n, to permit proof of a claim after the time fixed therein had expired, though the creditor's default was solely the result of accident and mistake.—*In re Sanderson*, U. S. D. C., D. Ver., 160 Fed. Rep. 278.

29.—**Collusion Between Bankrupt and Receiver.**—While receivers in fact selected by petitioning creditors in collusion with the alleged bankrupt will not be appointed the fact of such collusion, where it did not succeed, does not require the court to dismiss the petition in favor of one filed later by other creditors, but, where it is otherwise regular and sufficient, the adjudication will be made thereon.—*Birmingham Coal & Iron Co. v. Southern Steel Co.*, U. S. D. C., N. D. Ala., 160 Fed. Rep. 212.

30.—**Counsel Fees.**—Notice, as the court may direct, of proceedings under Bankr. Act c. 541, sec. 60d, to re-examine payments to counsel by bankrupt in contemplation of bankruptcy, held sufficient if an opportunity is given to contest the reasonableness of the charges.—*In re Wood*, U. S. S. C., 28 Sup. Ct. Rep. 621.

31.—**Discharge.**—Though generally the burden is on a creditor to sustain his opposition to the bankrupt's discharge, the rule does not apply where the question presented is one of law, e. g., the construction of a statute, and not one of fact.—*In re Gilpin*, U. S. D. C., E. D. Pa., 160 Fed. Rep. 171.

32.—**Discharge.**—Larceny or larceny as bailed, committed by a bankrupt against an objecting creditor more than a year before the petition was filed, held no ground for the refusal of a discharge.—*In re Wolf*, U. S. D. C., E. D. Pa., 159 Fed. Rep. 299.

33.—**Fraudulent Transfer of Property.**—Where the partners consent, their application of the partnership property to the payment of an individual debt of a partner within four months of the filing of a petition in bankruptcy, and while the partners and the firm were insolvent, does not evidence any intent to hinder or defraud the creditors of the firm, within Bankr. Act, c. 541, sec. 67e, and is not void, but voidable.—*Sargent v. Blake*, U. S. C. C. of App., Eighth Circuit, 160 Fed. Rep. 57.

34.—**Jurisdiction.**—Bankr. Act, c. 541, sec. 2, subd. 7, and sec. 23, subds. 67b, 67e, held to give the court of bankruptcy concurrent jurisdiction with the state court of a suit by the bankrupt's trustee to recover the proceeds of property transferred by the bankrupt to defendant corporation with intent to defraud the sellers thereof.—*Lynch v. Bronson*, U. S. D. C., D. Conn., 160 Fed. Rep. 139.

35.—**Petition for Review.**—Where on appeal from, and on petition for review of, a judgment determining priorities of liens upon land, the court is asked to consider evidence in the record, it will dismiss the petition for review and hear the case upon the appeal.—*Hendricks v. Webster*, U. S. C. C. of App., Eighth Circuit, 159 Fed. Rep. 927.

36.—**Pleadings.**—Under Bankr. Act, c. 541, sec. 18, subd. "b," the judge may consider a demurrer not filed in time if not filed for delay only, and in proper cases may extend the time to plead or answer.—*In re Cooper Bros.*, U. S. D. C., E. D. Pa., 159 Fed. Rep. 956.

37.—**Preferences.**—The decree of the Massachusetts land court granting registration of title to land under Rev. Laws Mass. c. 128, does not bar a suit in equity by a trustee in bankruptcy to enforce a reconveyance of the lands alleged to have been conveyed by the bankrupt as a preference against a defendant who was not a bona fide purchaser in good faith in reliance on the registered title.—*Morris v. Small*, U. S. C. C., D. Mass., 160 Fed. Rep. 142.

38.—**Witness Fees.**—Under Bankr. Act, c. 541, sec. 21a, held, that a bankrupt's husband cannot be compelled to testify in the bankruptcy proceeding without payment to him of his lawful fees.—*In re Marcus*, U. S. D. C., D. Ver., 160 Fed. Rep. 229.

39.—**Banks and Banking.**—Aiding Misappropriation.—In a trial for aiding a national bank cashier in misapplying a stock certificate held by the bank, the prosecution could show that the bank's minute book disclosed no record of the directors sanctioning the use of the certificate.—*Cook v. United States*, U. S. C. C. of App., Third Circuit, 159 Fed. Rep. 919.

40.—**Dissolution.**—The period for which a bank was chartered not having expired, it was authorized to sue on a note due it, notwithstanding it had gone into voluntary liquidation, paid off its depositors, and surrendered its certificate.—*Wilson v. First State Bank of Jetmore*, Kan., 95 Pac. Rep. 404.

41.—**Bills and Notes.**—Delay in Presenting Check.—Mere delay in presenting a check for payment will not release the drawer and indorser from liability, unless such delay caused a loss.—*State Bank of Gothenburg v. Carroll*, Neb., 116 N. W. Rep. 276.

42.—**Boundaries.**—Agreements. — Acquiescence in a boundary line does not presuppose an agreement to a line either express or implied; on the contrary, an agreement fixing the division

line will be presumed from long maintenance of a fence or other monument.—*Keller v. Harrison*, Iowa, 116 N. W. Rep. 327.

43.—**Brokers.**—Delegation of Authority. — Where a real estate agent has authority only to sell property, he cannot delegate authority to subagents to make a contract of sale which will bind the principal.—*Foss Inv. Co. v. Ater*, Wash., 95 Pac. Rep. 1017.

44.—**Carriers.**—Baggage of Passenger.—Where a trunk is delivered at a station in proper season, the passenger has the right to require that it be carried on the same train with him.—*Conheim v. Chicago Great Western R. Co.*, Minn., 116 N. W. Rep. 581.

45.—**Ejection of Passenger.**—On refusal to pay fare, and on the stopping of the train to eject him on that ground, any contract or any right to contract for passage on such train was forfeited.—*Mullins v. Illinois Cent. R. Co.*, Miss., 46 So. Rep. 529.

46.—**Insulting Passenger.**—Where a street railway conductor in an altercation with a passenger used insulting language, and after the passenger had left the car the conductor and motorman committed a battery on him, it is for the jury whether the altercation and battery were a part of one continuous wrongful act.—*Savannah Electric Co. v. McCants*, Ga., 61 S. E. Rep. 713.

47.—**Limiting Liability.**—Stipulations in bills of lading exempting the carrier from liability for floods, fire, etc., or any human agency, cannot exempt from liability for injuries which could have been prevented by extraordinary care on the part of the carrier and its servants.—*Inman & Co. v. Seaboard Air Line Ry. Co.*, U. S. C. C., S. D. Ga., 159 Fed. Rep. 960.

48.—**Protection From Fellow Passengers.**—A railroad company held liable for the failure of a guard to quell a disturbance or remove fellow passengers who were conducting themselves so as to cause injury, where he had knowledge of the conditions.—*McMahon v. Interborough Rapid Transit Co.*, 110 N. Y. Supp. 876.

49.—**Constitutional Law.**—Equal Protection.—Neither due process of law nor equal protection of the laws held denied to owner of property lying directly back of property abutting on street improvement by legislation creating a taxing district extending back from the line of the improvement 150 feet, and providing that property 50 feet or more from the street shall be liable if the abutting property proves insufficient to pay the costs of the improvement.—*Cleveland, C. & St. L. Ry. Co. v. Porter*, U. S. C. C., 28 Sup. Ct. Rep. 647.

50.—**Insurance Statutes.**—Civ. Code 1895, sec. 2140, making insurance companies liable for damages and attorney's fees for refusal in bad faith to pay a policy, held not in violation of Const. art. 1, pars. 2, 3, 4.—*Harp v. Fireman's Fund Ins. Co.*, Ga., 61 S. E. Rep. 704.

51.—**License Tax on Street Railways.**—An inviolable contract between a city and street railway companies which will prevent exaction of license tax held not created by ordinances passed granting use of streets under which companies have agreed to pay certain sums for the use of such streets, where the right to exact the license fees is not relinquished.—*City of St. Louis v. United Rys. Co.*, U. S. S. C., 28 Sup. Ct. Rep. 630.

52.—**Presumptions in Favor of Validity.**—Code Cr. Proc. sec. 454, providing for the commitment to the lunatic asylum of one acquitted

on the ground of insanity, having been in existence and operation for many years without question, the court held bound to presume in favor of its validity until its violation of the constitution is established beyond all reasonable doubt.—*People v. Baker*, 110 N. Y. Supp. 848.

53.—**Safety Appliance Act.**—Legislative power is not unconstitutionally delegated to the American Railway Association and the Interstate Commerce Commission by Safety Appliance Act, c. 196, sec. 5, 27 Stat. 531, requiring cars to have drawbars of a uniform height; the standard to be fixed by the association and declared by the commission.—*St. Louis, I. M. & S. Ry. Co. v. Taylor*, U. S. S. C., 28 Sup. Ct. Rep. 616.

54. **Contracts—Rescission.**—A contract rescinding a former contract between complainant and defendant and P. jointly held not illegal as permitting one of two joint contractors to contract for rescission without the consent of the other.—*Wehner v. Bauer*, U. S. C. C., N. D. Cal., 160 Fed. Rep. 240.

55.—**Written and Printed Portions.**—Where a contract was written on a printed blank, the written or typewritten provisions control an uncertain or repugnant printed provision.—*Heyn v. New York Life Ins. Co.*, N. Y., 84 N. E. Rep. 125.

56. **Contribution—Joint Debtors.**—Defendant S., in the absence of a promise, held not liable for contribution to plaintiff for money derived by plaintiff from property in which S. was interested and paid on a debt of a corporation in which plaintiff and S. were stockholders.—*McGeehan v. Reed*, Colo., 95 Pac. Rep. 348.

57. **Corporations—Authority of Officers.**—Under Comp. Laws 1897, Sec. 7040, one acting as secretary, treasurer and manager of a corporation held without authority to bind a corporation by a contract of employment for three years.—*Laird v. Michigan Lubricator Co.*, Mich., 116 N. W. Rep. 534.

58.—**Compensation of Officer.**—The president of a corporation held not entitled to recover for services rendered under an invalid resolution fixing salary, in the absence of allegation and proof that the services were outside, the ordinary duties of the office, notwithstanding the contract was executed.—*Steele v. Gold Fissure Gold Min. Co.*, Colo., 95 Pac. Rep. 349.

59.—**Directors.**—It is repugnant to the judicial policy of the state to permit the continuance in control of directors against whom is made out a prima facie case of malfeasance, or who appear to have been unfaithful to their trust.—*Fitzgerald v. State Mut. Bldg. & Loan Assn.*, N. J., 69 Atl. Rep. 564.

60.—**Insolvency.**—The stockholder of an insolvent corporation is not entitled to contribution from his co-stockholders for costs and expenses of an action brought against him to recover on his double liability where the only defense was personal to him.—*Harrison v. Scott*, Kan., 95 Pac. Rep. 1045.

61.—**Rates for Electric Lighting.**—A quasi public corporation furnishing electric power may fix rates based on the cost of production and may make experimental contracts which result in charging a less price to some customers than others for a limited time.—*Graver v. Edison Electric Illuminating Co.*, 110 N. Y. Supp. 603.

62.—**Sale by Promoters to Corporation.**—A company cannot avoid purchase of property sold to it by its promoters at a large profit while they owned all the stock, in contemplation of a large issue to the public.—*Old Dominion Cop-*

per Mining & Smelting Co. v. Lewisohn, U. S. S. C., 28 Sup. Ct. Rep. 634.

63.—**Sale of Stock.**—Where directors of a corporation by misrepresentation induced a stockholder to believe her stock worth less than its true value and to sell it to them at a price less than it was worth, held, that they were guilty of fraud, and the stockholder could recover damages after ceasing to be a member of the corporation.—*Von Au v. Magenheimer*, 110 N. Y. Supp. 629.

64. **Counties—Collection of Taxes.**—A person who has contracted with county commissioners for the collection of taxes is presumed to know the illegality of the contract, and cannot recover thereon on a quantum meruit.—*State v. Fry*, Kan., 95 Pac. Rep. 392.

65. **Courts—Expiration of Term.**—After final adjournment of a term, the court or judge has no power to make any other orders in a case in which a bill of exceptions was due at that term save to cause proper entries nunc pro tunc to be made.—*State v. Brannum*, Mo., 110 S. W. Rep. 695.

66.—**Following Decisions of State Courts.**—The rule established by decision of the courts of New Jersey that an engrossed act of the legislature duly approved, signed and filed is conclusive evidence of its contents, and cannot be contradicted by any evidence whatever, is one relating to the construction of the state statutes, and is binding on the federal courts.—*United States v. Andem*, U. S. D. C., D. N. J., 158 Fed. Rep. 996.

67.—**Supervisory Jurisdiction.**—A court must inquire whether the law either gives it jurisdiction or imposes on it the duty to entertain a given controversy, and must inquire into existence of facts upon which the law imposes the power and the duty, and in so deciding it acts judicially.—*State v. Williams*, Wis., 116 N. W. Rep. 225.

68. **Criminal Trial—Rape.**—In a prosecution for rape, it was error to permit the prosecution to prove by the prosecutrix that she had had intercourse with the defendant several times before and the price paid.—*People v. Lean*, Cal., 95 Pac. Rep. 380.

69. **Damages—Verdict.**—A verdict in favor of a father for loss of services of his minor daughter awarding him \$4,860 held excessive, and properly reduced to \$3,000.—*McHugh v. Rhode Island Co.*, R. I., 69 Atl. Rep. 853.

70. **Death—Parties to Action.**—Under Code 1906, Sec. 721, a widow, though not required to join her children in an action for her husband's wrongful death, could not deprive them of their right to participate in the damages recovered.—*Foster v. Hicks*, Miss., 46 So. Rep. 533.

71. **Deeds—Time of Taking Effect.**—A deed must take effect upon its execution and delivery or not at all, and a deed of land not to take effect until the death of the grantor is void as an attempt to make a testamentary disposition of property without complying with the statute of wills.—*Benner v. Bailey*, Ill., 84 N. E. Rep. 638.

72. **Descent and Distribution—Custody of Children.**—A child of half blood can inherit property descending through her father, though the father has been deprived of her custody by a decree in a divorce proceeding.—*McIntyre v. Gelvin*, Kan., 95 Pac. Rep. 389.

73. **Easements—Severance of Title.**—The purchaser of a building held to take it subject to the right of an owner of an adjoining building

to use a stairway and door in a partition wall as a necessary means of access to the second story of the adjoining building.—*Powers v. Heffernan*, Ill., 84 N. E. Rep. 661.

74. **Elections**—Political Parties. — Political parties result from the voluntary association of electors, and do not exist by operation of law; and they possess plenary powers as to their own affairs in the absence of legislative regulation. — *Morrow v. Wipf*, S. D., 115 N. W. Rep. 1121.

75. **Eminent Domain**—Right of Municipality. — The right of a municipality to take or damage private property for public use is no different than that of any other person or corporation having the right of eminent domain. — *City of Jackson v. Williams*, Miss., 46 So. Rep. 551.

76. — **School Lands**. — The territory of Oklahoma could recover from a railway company that had appropriated a portion of the land reserved for school purposes the rental value of the land so taken, and for the depreciation in the rental value of the remainder of the tract not taken. — *Territory v. Choctaw, O. & W. Ry. Co.*, Okl., 95 Pac. Rep. 420.

77. **Equity**—Dismissal of Bill Without Prejudice. — A complainant may ordinarily dismiss his bill without prejudice at any time before final hearing unless such dismissal will cause prejudice to defendant beyond that which arises from the risk of another suit. — *Houghton v. Whitin Mach. Works*, U. S. C. C., D. Mass., 160 Fed. Rep. 227.

78. — **Relief Awarded**. — Where a defendant as a matter of equity is entitled to be subrogated to a mortgage lien, equity may, as a condition precedent to equitable relief to the owner of the real estate, compel payment of the mortgage, even though it is barred by limitations. — *Hobson v. Huxtable*, Neb., 116 N. W. Rep. 278.

79. **Evidence**—Presumptions. — Where plaintiff was arrested while taking up cattle, in the discharge of his duties as a humane officer, it will be presumed that he, as an officer of the law, was discharging his duty in conformity to the statutes. — *Wyatt v. Burdette*, Colo., 95 Pac. Rep. 336.

80. — **Presumptions as to Intoxication**. — While there is a presumption that a man is sober until shown to be intoxicated, yet, when it is shown that he was intoxicated and that he took one drink, it might be found from this fact and further opportunity that he took more. — *Hoagland v. Canfield*, U. S. C. C., S. D. N. Y., 160 Fed. Rep. 146.

81. — **Questions Calling for Opinion**. — A question asked of an expert with reference to how far sparks emitted by a railroad engine would travel and be capable of setting fire on a windy day held objectionable. — *Hitchner Wall Paper Co. v. Pennsylvania R. Co.*, U. S. C. C., E. D. Pa., 158 Fed. Rep. 1011.

82. **Exceptions, Bill of**—Signature of Judge. — Where the special judge who tried a case had been elected to hold a part of a term of court, and signed a bill of exceptions in the case after the term, held, that the bill was not properly authenticated. — *Berry v. Leslie*, Mo., 110 S. W. Rep. 685.

83. **Execution**—Right to Stay. — A stay of execution is not a right but a privilege, which the law making body may grant upon such easy or burdensome conditions as are deemed wise. — *Petrified Bone Min. Co. v. Rogers*, U. S. C. C., E. D. Pa., 159 Fed. Rep. 1019.

84. **Executors and Administrators**—Discovery

of Assets. — An order requiring a person suspected of having property belonging to an estate to deliver it to the administrator held appealable, and a final and conclusive adjudication of the issue submitted if not appealed from. — *Barto v. Harrison*, Iowa, 116 N. W. Rep. 317.

85. **Fire Insurance**—Earthquake Clause. — A provision in a fire insurance policy exempting the insurer from liability for any loss or damage by fire caused directly or indirectly by earthquake is valid and enforceable. — *Richmond Coal Co. v. Commercial Union Assur. Co.*, Limited of London, England, U. S. C. C., W. D. Cal., 158 Fed. Rep. 983.

86. — **Keeping Itemized Account**. — The failure of insured to keep an itemized account of his daily cash sales, as required by his fire policy, does not avoid the policy, where he entered them on his books. — *Arkansas Ins. Co. v. McManus*, Ark., 110 S. W. Rep. 797.

87. **Fraud**—Evidence. — Except where confidential relations are involved, the presumption of law is in favor of honesty and fair dealing, and the evidence in support of a claim of fraud must do more than to create a suspicion thereof. — *Wendling Lumber Co. v. Glenwood Lumber Co.*, Cal., 95 Pac. Rep. 1029.

88. **Frauds. Statute of**—Executed Contract. — Where defendant erected a building on a lot owned by his mother, with her oral consent, the building being completed and the contract fully executed, the contract was thereby taken out of the statute of frauds so as to give defendant a valid equitable interest in the property. — *Westport Lumber Co. v. Harris*, Mo., 110 S. W. Rep. 609.

89. **Habeas Corpus**—Determination of Issues. — On habeas corpus, the future welfare of an 11-year old child held best served by remanding her to the custody of respondents, with whom she had lived for 10 years. — *People v. Phelps*, 109 N. Y. Supp. 943.

90. **Homestead**—Property Subject. — After a family had moved from the husband's farm to a house on town lots which he owned, the husband left his wife and child and returned to the farm, where he lived until his death. The wife and child continued to live only on the lots. Held, that their homestead right was only in the lots. — *Miller v. Miller*, Ill., 84 N. E. Rep. 681.

91. **Homicide**—Assault with Intent to Kill. — To constitute murder in the first degree, the killing must be committed with express malice aforethought, or in perpetrating or attempting to perpetrate a crime punishable with death. — *State v. Mills*, Del., 69 Atl. Rep. 841.

92. **Husband and Wife**—Homestead. — Where a woman and her putative husband were living together illegally at the time he bought certain property, they did not constitute a family within the meaning of the homestead law, so as to permit such property being declared homestead property, and a conveyance of the land by him was not void because she did not join therein. — *Middleton v. Johnston*, Tex., 110 S. W. Rep. 789.

93. **Injunction**—Secret Processes. — Plaintiff's secret unpatented process for extracting alcohol from the wood of empty whisky barrels held not covered by patents of others, so that a state court has jurisdiction of a suit to enjoin a fraudulent use of it. — *Eastern Extracting Co. v. Greater New York Extracting Co.*, 110 N. Y. Supp. 738.

94. — **Grounds for Relief**. — Equity will not restrain an action at law by lessor to dispossess lessee or for rent on the ground that a certain

covenant by a lessor was a condition precedent to the payment of rent and had not been performed.—*White v. Young Men's Christian Assn. of Chicago, Ill.*, 84 N. E. Rep. 658.

95.—**Temporary Injunction.**—A temporary injunction rests in the discretion of the court, and there should be such a full showing of all the facts that the judge may act with a thorough understanding.—*State v. City of Parsons, Kan.*, 95 Pac. Rep. 391.

96.—**Interstate Commerce.**—Requiring Railroad to Operate Route.—Interstate commerce held not burdened by requiring railroad companies to operate a particular line which they selected in a petition to state railroad commission for approval of a consolidation.—*Mobile, J. & K. C. R. Co. v. State of Mississippi, U. S. S. C.*, 28 Sup. Ct. Rep. 650.

97.—**Intoxicating Liquors.**—Ordinances.—A city under its charter held to have power to pass an ordinance forbidding liquor licensees to permit females to frequent their place of business for the purpose of drinking.—*People v. Case, Mich.*, 116 N. W. Rep. 558.

98.—**Sales to Minors.**—A licensed liquor dealer must use due diligence to ascertain whether a person desiring liquor is of age.—*State v. Salkowski, Del.*, 69 Atl. Rep. 839.

99.—**Judgment — Estoppel.** — That a party, through mistake, attempts to exercise a right or pursue a remedy to which he is not entitled, does not preclude him from afterwards pursuing a remedy for relief to which he is entitled.—*Water, Light & Gas Co. v. City of Hutchinson, U. S. C. of App., Eighth Circuit*, 160 Fed. Rep. 41.

100.—**Full Faith and Credit.**—The Mississippi courts cannot deny to a judgment of a Missouri court, based on award in arbitration proceedings in Mississippi, the full faith and credit secured by Const. U. S. art. 4, Sec. 1, to the judgments of sister states because the original controversy grew out of a gambling transaction in Mississippi, made a misdemeanor by Ann. Code Miss. 1892, Secs. 1120, 1121, 2117.—*Fauntleroy v. Lum, U. S. S. C.*, 28 Sup. Ct. Rep. 641.

101.—**Landlord and Tenant.**—Constructive Eviction.—That a fellow tenant in apartments above defendant's kept a dog, which when left alone barked, etc., held not to constitute an eviction of defendant, so as to release him from liability for rent under a lease.—*McKinny v. Browning*, 110 N. Y. Supp. 562.

102.—**Forfeiture of Lease.**—A sale by trustee in bankruptcy under order of court of bankrupt's interest as lessee held not a breach of condition in such lease that if the lessee assigned or his interest should be sold under legal execution without the lessor's consent it should be void.—*Gazlay v. Williams, U. S. S. C.*, 28 Sup. Ct. Rep. 687.

103.—**Improvements.**—A lessor has no right, without the consent of the lessee, to impose additional burdens on leased premises, or to enter thereon for the purpose of improving the same.—*Hirsh v. Valloft, La.*, 46 So. Rep. 103.

104.—**Recovery of Premises.**—Where a contract of a landlord for leasing does not by its terms terminate the tenancy, two notices held essential to enable the landlord to maintain unlawful detainer, one to terminate the tenancy and the other a demand, after the termination, for a surrender of possession.—*Ross v. Gray Eagle Coal Co., Ala.*, 46 So. Rep. 564.

105.—**Life Estates.**—Crops.—Where a tenant

for life, with power to make an appointment of the fee by will, appoints the fee by will and dies before a crop has been severed from the land, the crop passes to his representative as personal property.—*Keays v. Blinn, Ill.*, 84 N. E. Rep. 628.

106.—**Life Insurance.**—Solvency of Company.—In determining the financial condition of an insurance company organized under the natural premium or mutual assessment plans, its probable income from premiums on policies issued must be considered.—*Dempster v. Opocensky, Neb.*, 116 N. W. Rep. 524.

107.—**Limitation of Actions.**—Action on Accident Policy.—Laws 1905, p. 9, c. 5, providing that a mortgagor's absence or nonresidence shall not suspend the running of limitations as to proceedings for foreclosure, does not apply to causes of action which accrued before the passage of said statute.—*A. D. Clarke & Co. v. Doyle, N. D.*, 116 N. W. Rep. 348.

108.—**Application of Payments.**—Payment of an indebtedness by a firm for the benefit of the lender of demand funds to the firm and a charge of such amount on the lender's account held not to revive loans against which limitations had run, but should be applied entirely to the payment of loans not then barred.—*In re Girvin, U. S. D. C.*, 160 Fed. Rep. 197.

109.—**Mandamus.**—Where Lies.—Mandamus held not to lie to compel the state board of agriculture to sever water and sewerage connections between the sewerage and water plants of the state agricultural college and individuals owning lands adjacent to the college grounds.—*Attorney General v. State Board of Agriculture, Mich.*, 116 N. W. Rep. 552.

110.—**Marriage.**—Guilt of Illegal Marriage.—The mere fact that a woman's prior undissolved marriage renders her subsequent marriage void does not make her "the guilty party" in a proceeding to nullify the marriage, within Pub. St. 1901, c. 175, Sec. 13, authorizing an order against the guilty party providing for the support of their child.—*Bickford v. Bickford, N. H.*, 69 Atl. Rep. 579.

111.—**Master and Servant.**—Assumed Risk.—Rule that employee does not assume risk of danger arising from negligence of his employer held not to apply where negligence and resulting danger are known to the employee before entering upon performance of his work.—*De Kallands v. Washtenaw Home Telephone Co., Mich.*, 116 N. W. Rep. 564.

112.—**Contributory Negligence.**—Where an employee injured by slivers flying from a chisel used by co-employees had no reason to anticipate injury because of lack of knowledge of the condition of the chisel, there was no occasion for the employee to attempt to avoid injury.—*Baltimore & O. S. W. R. Co. v. Walker, Ind.*, 84 N. E. Rep. 730.

113.—**Incompetency of Fellow Servant.**—Where a superintendent having full charge of the work had knowledge of the incompetency of a fellow servant, through whose negligence plaintiff was injured, such knowledge was imputable to the master.—*McCall's Ferry Power Co. v. Price, Md.*, 69 Atl. Rep. 832.

114.—**Injury to Servant.**—A declaration that a locomotive engineer was killed by a derailment caused by a collision with a cow which strayed on the track owing to defendant's negligence in failing to fence its right of way stated no cause of action against the railroad company at common law.—*Gill v. Louisville & N.*

R. Co., U. S. C. C., E. D. Tenn., 160 Fed. Rep. 260.

115.—**Injury to Servant.**—It is not contributory negligence for an employee to go between the cars to couple them, where the coupling could have been safely performed had not another car of whose movements he had not been warned been pushed against it.—*Pecard v. Menominee River Sugar Co.*, Mich., 116 N. W. Rep. 532.

116.—**Injury to Third Party.**—Where a cornice during the process of construction fell and injured a pedestrian, whether the owners of the property ought to have anticipated the accident or taken precautions to guard against its consequences held for the jury.—*Chute v. Moeser*, Minn., 95 Pac. Rep. 398.

117. **Mines and Minerals** — **Conflicting Lode Locations.**—Ground embraced in a mining location may become part of the public domain so as to be subject to another location if, when the second location is made, there has been an actual abandonment by the first locator.—*Farrell v. Lockhart*, U. S. S. C., 28 Sup. Ct. Rep. 681.

118. — **Proceedings on Adverse Claim.** — Where an adverse claimant to a mining claim fails to show any right to the ground in controversy, he cannot object that the claimants are not entitled to a patent because of the insufficiency of their declaratory statement.—*Milwaukee Gold Extraction Co. v. Gordon*, Mont., 95 Pac. Rep. 995.

119. **Monopolies**—**Enticement of Employees.**—Enticement of plaintiff's employees by defendant and oppression of such of defendant's employees as bought stock in plaintiff company held not a violation of the Sherman act.—*American Banana Co. v. United Fruit Co.*, U. S. C. C., S. D. N. Y., 160 Fed. Rep. 184.

120. **Mortgages**—**Subrogation.**—Where a junior mortgagee redeemed from the foreclosure sale on a first mortgage, she became subrogated to all of the first mortgagee's rights to the same effect as though the first mortgagee had assigned to her the certificate of sale issued foreclosure of the first mortgage.—*Bristol v. Hershev*, Cal., 95 Pac. Rep. 1040.

121. **Municipal Corporations**—**City Council.**—A meeting of the city council held a valid "called meeting" within the city charter and an ordinance, notwithstanding the notice therein provided for may not have been given.—*Ryan v. City of Tuscaloosa*, Ala., 46 So. Rep. 638.

122.—**Defective Sidewalks.**—One repairing a sidewalk held not negligent in taking up a flag thereof, and temporarily leaving a depression, into which one steps in the daytime.—*Fitzgerald v. Degnon Contracting Co.*, 110 N. Y. Supp. 857.

123.—**Negligence.**—In an action against the owner of a brewery for personal injuries to a child nine years old, which was injured by falling over a projecting lever attached to a malt box standing on the sidewalk, defendant's negligence held for the jury.—*Stahle v. Poth*, Pa., 69 Atl. Rep. 864.

124.—**Power to Issue Bonds.**—Where the power to incur a debt for a necessary expense exists, a town may issue bonds for its payment, if prudence and existing conditions render that course desirable.—*Commissioners of Town of Hendersonville v. C. A. Webb & Co.*, N. C., 61 S. E. Rep. 670.

125. **Navigable Waters**—**Nuisances.**—A pier extending from high-water mark, which does

not interfere with navigation or with the use by the public of the waters, is not a nuisance.—*Barnes v. Midland R. Terminal Co.*, 110 N. Y. Supp. 545.

126. **Parent and Child**—**Right to Custody.**—Where a mother is able to properly provide for her child, that its grandparents are better able financially to do is not ground for depriving her of its custody.—*People v. Beau-doin*, 110 N. Y. Supp. 592.

127. **Railroads** — **Care Required as to Trespassers.**—A railroad engineer, while bound to take immediate steps to avoid injuring a trespasser on receiving notice that the trespasser is unable to care for himself, in the absence of such notice is entitled to assume that he will leave the track up to the last moment of his ability to do so before being struck by the train.—*Beach v. Southern Ry. Co.*, N. C., 61 S. E. Rep. 664.

128. **Sales**—**Fraud.**—Where personal property is purchased by fraud, the seller held to have the same right of action against one acquiring the property from the fraudulent purchaser, unless he is a bona fide purchaser, that he would have against the purchaser.—*Wendling Lumber Co. v. Glenwood Lumber Co.*, Cal., 95 Pac. Rep. 1029.

129. **Telegraphs and Telephones**—**Negligence.**—A telegraph company negligently transmitting a message authorizing the sendee to purchase cotton for the sender held liable for specified damages.—*Western Union Telegraph Co. v. McCants*, Miss., 46 So. Rep. 535.

130. **Usury**—**Interest on Mortgage.**—The purchaser of real estate subject to a mortgage thereon for interest partly in excess of 12 per cent can defend as against usury on the ground that he stands in privity with the mortgagor.—*Grove v. Great Northern Loan Co.*, N. D., 116 N. W. Rep. 345.

131. **Warehousemen** — **Admissibility of Evidence.**—In an action on a contract to recover storage charges on goods stored with plaintiff, and the charges paid for having them moved to a warehouse, letters to defendant held admissible to show defendant's knowledge of why they were removed.—*Cahill v. Phelps*, Mass., 84 N. E. Rep. 496.

132. **Waters and Water Courses**—**Surface Waters.**—Where the land of defendant could not be drained by the natural outlet, he was not justified in cutting a ditch, delivering the waters into another water course to the damage of plaintiff owning lands through which the water course ran.—*Erhard v. Wagner*, Minn., 116 N. W. Rep. 577.

133. **Wills**—**Testamentary Capacity.** — That testator bequeathed his property to his servant held not indicative of unsoundness of mind.—*Lum v. Lasch*, Miss., 46 So. Rep. 559.

134. **Witnesses**—**Competency.**—A witness held incompetent to testify as to the practice of defendant's engineers with reference to punching holes in the spark arresters to make the engines steam better.—*Hitchner Wall Paper Co. v. Pennsylvania R. Co.*, U. S. C. C., E. D. Pa., 158 Fed. Rep. 1011.

135. **Work and Labor**—**Amount of Recovery.**—That the sum received from an insurance company by the owner of a building destroyed by fire to replace it exceeded the reasonable value of the new building does not entitle the contractor replacing the building to recover such sum in an action on a quantum meruit.—*Foulger v. McGrath*, Utah, 95 Pac. Rep. 1004.

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IS A REFLECTION ON TRIAL COURT'S MOTIVES IN RENDERING DECISION GROUND FOR DISBARMENT?

The practice of merely censuring attorneys who reflect seriously on the integrity of the courts before whom they practice, while it evidences dignity and commendable self-control on the part of the judiciary, is not commensurate with the offense.

Where such reflections proceed from laymen or from the lay press, it is probably wiser and more becoming on the part of the court to ignore them, unless they are in relation to a case pending, but where attorneys are guilty of such conduct, the punishment should be immediate suspension or disbarment, especially where such animadversions are deliberately written or printed in briefs or affidavits submitted to a court having supervisory jurisdiction over the court or judge against whom the attack is directed.

This was the decision in the recent case of *In re Rockmore*, 111 N. Y. Supp. 879, where it was held that where an attorney submits to an appellate court an affidavit reflecting upon the judicial integrity of the court from which the appeal is taken, such action constitutes unprofessional conduct justifying suspension from practice, notwithstanding he fully retracts and withdraws the statements, and asserts that the affidavit was the result of an impulse caused by what he considered a grave injustice.

The court was fully alive to the seriousness of such reflections, coming from an officer of the court, as well as to the fact that they were grossly unprofessional, and declared itself in no uncertain terms, saying: "We cannot shut our eyes to the fact that there is a growing habit in the profession of criticising the motives and integrity of judicial officers in the discharge of their

duties, and thereby reflecting on the administration of justice and creating the impression that judicial action is influenced by corrupt or improper motives. While we recognize the inherent right of an attorney in a case decided against him, or the right of the public generally, to criticise the decisions of the courts, or the reasons announced for them, the habit of criticising the motives of judicial officers in the performance of their official duties, when the proceeding is not against the officers whose acts or motives are criticised, tends to subvert the confidence of the community in the courts of justice and in the administration of justice; and when such charges are made by officers of the courts, who are bound by their duty to protect the administration of justice, the attorney making such charges is guilty of professional misconduct."

The unfortunate attorney made ample and profuse apology, but the court held that the offense was too serious to be cured by a mere apology, saying: "The respondent admits the impropriety of his action and states that he filed his affidavit without malice and with the best of motives, but not with the best of judgment; that in this affidavit it was not intended in any way to reflect upon or injure the court, and that the affidavit was made while the respondent was laboring under a sense of injustice which for the time being obscured his judgment; and he fully retracts and withdraws all the statements in the said affidavit contained which in any wise reflect upon or impugn the motives of the court. He also states that this was his first offense, and asks that he may be absolved from intentional wrongdoing, and is prepared to make such reparation as the court deems he should make in the premises. This court is not concerned so much with the punishment of the respondent as with the discharge of its duty of protecting the administration of justice; and, while we are willing to accept the statement of the respondent that preparing and filing this affidavit was the result of an impulse caused by what he considered a great injustice inflicted upon himself and his client, we cannot overlook the fact that the statements are made

in an affidavit deliberately sworn to by the respondent and which was submitted to the court to influence its judicial action. It all shows deliberation and premeditation, and not the impulsive writing of a letter, or oral remarks addressed to the court, and is, we think, within section 67 of the Code of Civil Procedure; and we do not think that we are justified in overlooking this offense. The respondent must, therefore, be suspended from practice for the period of six months, and we wish to have it understood that in the future we shall deem it our duty to treat such an offense as a serious breach of the duty that attorneys owe to the courts of the state and to the administration of justice."

There is no doubt but that defeat in a hotly contested law suit provokes an attorney to a pardonable outburst of feeling against rulings of the court which has occasioned his downfall. It is the wiser practice on such occasions to go to the nearest tavern and indulge the time-honored privilege of the bar of "cussing the court," than to immediately file the necessary motions to perfect an appeal and brief the case for the higher court, while the mind is thus seething with indignation and incapable of calm, dignified and convincing argument.

NOTES OF IMPORTANT DECISIONS

INJUNCTION—BREACH OF CONTRACT NOT TO ENGAGE IN SIMILAR EMPLOYMENT.—That equity will not enjoin a breach of contract of a bookkeeper not to engage in the liquor business in the state, in the absence of some special equity, involving good will, peculiar intellectual or other skill or capacity, secret process of business, or other recognized ground, was the decision of the court in the case of *Simms v. Gurnette*, 46 So. 90. The contract in this case was as follows: "I will be pleased to have you enter my employ as bookkeeper. I will pay you a salary of one hundred dollars per month for a period of two years from May 1, 1906. You are to give your entire time to my business, and to perform same in a satisfactory manner, and, in the event of you ever leaving me for any cause, you to agree to never enter into the liquor busi-

ness with any other firm in the state of Florida." The court in distinguishing this case from such cases as usually come within the protection of equity jurisdiction, said: "The view we take of this contract renders much of the discussion in the briefs of counsel useless. The case does not present a question as to the reasonableness of the contract, tested by the 'restraint of trade' rule, but whether a court of equity will intervene to enforce specific performance thereof negatively by enjoining its breach. Burnette had no 'good will' to sell, nor did he possess any peculiar intellectual or other skill or capacity that could not readily be supplied by the ordinary demands for employment. There is no trade secret or secret process involved, in the sense it is understood as a basis for equitable interference. On the contrary, the bill alleges nothing more than that universal knowledge, gained by every successful business of long standing, as to where and what it is best to buy and where best to sell. His employment for a few months as bookkeeper gave him no direct contact with the complainant's customers, so as to create a personal influence and following upon and among them, which might be carried as an asset to the new firm. The secret copying from the books of the names of the dealers and of the prices and the names of the complainant's customers is an allegation tending to show bad faith; but no authority has been cited to us, nor have we found any adjudicated case holding that this fact alone would authorize an injunction against the one committing such breach of faith entering into business at all. In short, the bill alleges nothing but the breach of a contract for ordinary personal service, as to which it does not appear that the common law remedy is not fully adequate."

ARE NATURAL WATER POWERS PUBLIC PROPERTY?

Nature of Title to Falling and Running Water.—The idea of ownership involves the idea of a person in whom the right of ownership resides and of a thing over which it is exercised. It implies power in the person of use or control over the thing. The right and power, in the case of private ownership, is exclusive. The force of public opinion supports the person in question in the use or control of the thing in question, and denies a like use of it to others.

The owner, has, to the extent of his ownership sole dominion over the thing owned. In the case of inanimate chattels his dominion is absolute save that they are subject to be seized for taxes or in satisfaction of a judgment, etc. In the case of animals, dominion is further limited by forbidding a use or control that would involve cruelty. To the limitations imposed by law must be added those resulting from the character of the thing itself. Land is in its nature fixed and immovable, and although public sentiment or the law may set no limits to the owner's use of it, these necessarily follow from its inherent qualities. While he may plow or dig into its surface, he cannot change its locality. On the other hand, chattels can be moved from place to place, or confined at the will of the owner. But in its nature, running or falling water is not, except in an insignificant degree, subject to control, at least where it exists in any large volume. Of it, Blackstone says: "It is a movable, wandering thing, and must of necessity continue common by the law of nature; so that I can only have a temporary, transient, usufructuary property therein; wherefore if a body of water runs out of my pond, into another man's I have no right to reclaim it." He further says that a grant of water passes nothing but a right of fishing, and presumably he has reference to small ponds or insignificant streams deemed to be a part of the real estate.¹ It is manifest as Blackstone remarks, that title to any large volume of running water must be confined to a temporary, transient use of each particle of the water while it passes. The very term water power refers to the force of the moving water, but as its flowage is perpetual it is hardly correct to speak of a usufructuary interest as transient. The right to use a large head of water, if a right of which the state cannot deprive the owner without compensation, is certainly a very valuable right. Its value is in no wise diminished by the fact that it is not a right which gives title to the water itself.

(1) B. B. 2 p. 18.

The right to take the water to remove it from its bed to exercise complete control over it, to exclude all others from a like exercise of control might be nominally conferred by the state upon the individual, but it would be valueless, for like the right to communicate with the inhabitants of Mars it would be impossible.

Riparian Owner's Right to Use of Water Power.—While the extent of the right of the riparian owner to the use of water power as against the state is still undefined and uncertain, there can be little doubt that his right is such as to entitle him to compensation for permanent improvements. If for example the owner of land on both sides of a water fall were to incur great expense in constructing and equipping a power house suitable for the utilization of the full head of water obtainable, no one would contend that the state could take possession of the water power thus developed and apply it to public uses, without compensating the riparian owner. But a different case would be presented where it might be necessary to divert the water for the purposes of navigation, in such manner as to destroy the power house and other equipment for the use of the water for power. So there might be difficulty in determining the law applicable to a case where only a small part of the available power was developed, and for the purpose of developing the whole, destruction of the partial works would be necessary. Would the action of the state in such cases be a taking of private property for which it would be necessary to give compensation? If the riparian owner's right to the use of water power be an ordinary right of property, it would seem that he would be as much entitled to compensation, when that right was rendered worthless, as he would be when deprived of any other class of property. But it is well settled that his right of property in the use of the water or the land under it is not absolute, at least in navigable streams.

May Not Obstruct Navigation.—The

universal rule is that the public have the right to the use of the stream for navigation, and although by damming it the riparian owners might develop a very valuable water power, he would have no right to do so to the impairment of the public right of navigation.² And such a dam or any other obstruction to navigation is a public nuisance and no lapse of time will bar the right of the public to remove it.³ For, the state itself has

(2) *Charnley v. Shawana Water Power & R. Improv. Co.*, 53 L. R. A. 903.

(3) *Charnley v. Shawana Water Power & Imp. Co.*, 53 L. R. A. 903, 109 Wis. 563; and note where the following cases are cited: *Southern Ry. Co. v. Ferguson*, 105 Tenn. 552, 59 S. W. 343. *Vooht v. Winch*, 2 Barn. & Ald. 662; *Renwick v. Morris*, 7 Hill 575; *Olive v. State*, 86 Ala. 88, 4 L. R. A. 33; *Crill v. Rome*, 47 How. Pr., 406; *Ryer v. Curtis*, 72 Me. 181. So the obstruction of the passage of fish to an inland lake is a public nuisance, *State v. Franklin Falls Co.*, 49 N. H. 240, 6 Am. Rep. 513. In *State v. Roberts*, 59 N. H. 256, it was said that no one can obtain a prescriptive right to maintain a dam or other artificial obstruction to the passage of fish up or down a stream. A riparian owner cannot acquire by prescription the right to maintain a dam and mill so as to defeat the right of the public in an easement to float logs down a stream capable of such use. 65 N. H. 190, 18 Atl. 794; and no lapse of time will bar an action on the case for maintaining a dam across a stream capable in its natural state of floating logs, rafts and timber, and thereby obstructing the passage of the plaintiff's logs, as a dam so constructed is a public nuisance, which no length of time will legalize. *Knox v. Chanoler*, 42 Me. 150. Length of time will not legalize a nuisance consisting of a bank erected in a harbor. But where riparian owners have maintained wharves without complaint or interruption from any source for twenty-five years, they will not be declared to be nuisances at the instance of the municipal authorities, whose acts in the erection of the bridge and the dredging of the stream caused the wharves to be obstructions to navigation of which they complain, *Chicago v. Laflin*, 149 Ill. 172. The deposit into a navigable stream, by a hydraulic mining company, of debris consisting of gravel, sand and other refuse . . . to the impairment of navigation constitutes a public nuisance the right to continue which cannot be acquired by prescription, so as to bar a proceeding in equity instituted by the attorney general in the name of the people to compel a discontinuance of the acts which constitute the nuisance . . . *People v. Gold Run Ditch & Mining Co.*, 66 Cal. 138, 56 Am. Rep. 80, 4 Pac. 1152. And the obstruction of a harbor by depositing sawdust, chips and bark and other refuse matter from a mill into a race-way leading therefrom, in violation of a municipal ordinance is a public nuisance which no length of time will legalize. *Ogdensburg v. Lovejoy*, 2 Thomp. & C. 83. Affirmed 58 N. Y.

no power to obstruct navigation contrary to the regulations of congress. It is only navigation upon rivers entirely within the state, and having no connection with interstate navigable waters that the state can regulate.⁴ Of course where a

66. So a mill owner can acquire no right by prescription to cast slabs, edgings and waste into a stream capable in its natural state of floating logs, rafts and lumber, if the stream or channel is thereby obstructed. *Veazie v. Dwinel*, 50 Me. 497. And the filling and narrowing of the channel of a navigable river with the debris resulting from hydraulic mining to the injury of navigation and the danger of riparian owners is a public nuisance which can never become lawful by any length of exercise, so as to bar a suit to abate it brought by a private person who has sustained special damage. *Mining Debris Case*, 9 Sway. 441, 18 Fed. 753. But if the acts of a mill owner in reducing for a short time each year, the area and depth of the water in a great pond, thereby diminishing the enjoyment by the public of boating, create a technical public nuisance, neither principle nor authority, require the application in such case of the rule that no length of time will legalize a nuisance, there being a statute permitting the acquisition by desseism of a complete title against the state. *Atty. Gen. ex rel Mann v. Revere Copper Co.*, 152 Mass. 444.

(4) "As a general rule, it may be stated that no state can lawfully destroy the capacity of a body of water for navigation unless it is completely and absolutely within its jurisdiction. Whatever be its powers over waters over which it has absolute dominion it certainly cannot destroy rights which belong equally to other states although it has been held that an act of congress declaring an existing bridge over the Mississippi a lawful structure, does not unconstitutionally violate an existing treaty with a foreign power that the navigation of such river shall remain free and unobstructed forever. *The Clinton Bridge*, Woolw. 150, Fed. Case No. 2900." And a compact between two states that a river shall be free and common to the citizens of the United States will not deprive congress of the power of authorizing the construction of a bridge over the stream. *Pa. & Wheeling & B. Co.*, 18 How. 421, 15 L. ed. 435. The paramount power of regulating bridges that affect navigation on the navigable waters is in congress. *New Port & C. B. Co. v. United States*, 105 U. S. 470, 15 L. ed. 435. Congress has absolute power and control over navigable waters of the United States in the interests of commerce and the right to declare what may and may not constitute obstruction thereto. *United States v. North Bloomfield Min. Co.*, 81 Fed. 243. Congress cannot construct a bridge over a navigable water under the commercial power, or under the power to establish post roads. This belongs to the local or state authorities of the state, within which the work is to be done. But this authority must be so exercised as not materially to conflict with the paramount power to regulate commerce. *United States v. Railroad Bridge Co.*, 6 McClear, 517.

water power dam obstructs navigation, and is consequently a public nuisance, its destruction would not entitle the owner to compensation.⁹ On the contrary, any private person, especially injured, would have a right of action against the riparian owner of the water power dam, or against the person who in any other way impeded navigation to his injury. Thus, where a log driver, using the Catawaba river⁶ for the purpose of floating float logs and poles to a mill farther down the stream, suffers loss through a jam occasioned by a bridge improperly constructed, he has a right of action against the county responsible for the improper construction of the bridge. In *Cox v. State*,⁷ it was held that a statute

Fed. Case No. 16,114. But the supreme court held that congress may directly, or through a corporation created for that purpose, construct bridges for the accommodation of interstate commerce. *Luxton v. North River Bridge Co.* 153 U. S. 525, 38 L. ed. 808. It is res judicata that New Jersey has no right to the soil under the water below low water mark in Staten Island sound such as will prevent the construction of a bridge thereon in accordance with United States authority. *State v. Bolter*, 14 N. J. L. 102. Under the paramount power of congress to regulate commerce, its determination that the construction of a bridge authorized by it will not interfere with navigation is conclusive. *Miller v. New York*, 13 Blatch. 469, Fed. Case No. 9,585. Congress has power to prescribe the place and manner of constructing bridges across the Mississippi river so that navigation may not be interfered with, and the United States has the right to prevent through the process of the courts attempts to construct them otherwise or elsewhere. *United States v. Milwaukee & S. P. R. Co.*, 5 Biss 410, Fed. Case No. 15,778. Under its power to regulate commerce, congress can authorize the construction of a bridge across navigable waters independent of the consent or concurrence of the state government. *Stockton v. Baltimore & N. Y. R. Co.*, 1 Inters. Com. Rep. 411, 32 Fed. 9. For the purpose of interstate commerce, congress can lawfully authorize the construction of a bridge within the limits of a state which has not consented to but has protested against the proposed structure. *Pa. R. Co. v. Baltimore & N. Y. R. Co.*, 37 Fed. 129; congress has power to order the removal of a bridge as an obstruction to navigation where it spans a navigable river over which it has assumed jurisdiction, although the river is wholly within the limits of the state which authorized its construction. *United States v. Moline*, 82 Fed. 592. Note to *Hutton v. Webb*, 59 L. R. A. 33.

(5) See cases cited in note.

(6) *Sutton v. Webb*, 124 N. C. 749, 126 N. C. 837.

(7) 3 Blackf. 193. Note 59 L. R. A. 42.

authorizing the construction of a mill dam in a navigable river, which is an obstruction to navigation, is in violation of the ordinance of 1787 declaring navigable waters leading into the Mississippi and St. Lawrence rivers common highways which shall be forever free, and is unconstitutional and void. In *Dover v. Portsmouth Bridge*,⁸ that although constructed under legislative authority from two states for the purpose of accommodating traffic between them, a bridge across a navigable river which tends to destroy commerce, obstruct the collection of the revenue, or prevent the navy from resorting to navigable waters or to naval yards or depots necessary for their use, was an abatable nuisance. "A dam across a navigable river is liable to abatement as a nuisance, although built under legislative authority, if it materially obstructs the navigation of the river."⁹ "A dam across a navigable river, erected pursuant to a legislative act requiring that it do not interfere with navigation may be regarded as a nuisance if not kept in the condition required by the act, and an action as for injury by a nuisance may be maintained by the owner of a boat injured by reason of the obstruction of navigation occasioned thereby."¹⁰ One having a legislative grant to build and maintain a dam across a navigable river, on condition of making and keeping in good order and repair a lock for the safe passage, without delay or expense, of such boats and other craft as usually navigate the river and also a sluice of stated dimensions for the benefit of shad fishery, is only liable on such default to such persons as bring themselves within the terms of the grant e. g., navigators of such craft as usually navigated the river when such grant was made.¹¹ Cases might be cited indefinitely to the point that whatever use the riparian owner may

(8) 17 N. H. 200. Note 59 L. R. A. 42.

(9) *Renwick v. Morris*; 3 Hill 621. Note *State v. Sunapee Dams Co.*, 59 L. R. A. 62.

(10) *Hogg v. Zanesville Canal & Mfg. Co.*, 5 Ohio 410. Note *State v. Sunapee Dams Co.* 59 L. R. A. 63.

(11) *Farwell v. Smith*, 16 N. J. L. 133. Note *State v. Sunapee Dams Co.* 59 L. R. A. 62.

make of the water adjoining his premises must be made subject to the public right of navigation, and although the proper legislative authority may grant him the right to obstruct navigation, in this country, that authority vests in congress, save only in the case of waters unconnected with interstate navigable streams. This rule is the same where the riparian owner owns to the thread of the stream. The public right of navigation is not affected by the fact that the owner of the upland has title also to the land under the water. His title to the subaqueous land does not give him any right to erect structures thereon to the impediment of navigation.¹² This was the rule at common law. "Two distinct rights are regarded, viz.: (1) The *jus privatum* or right of property in the soil, which the king may grant and which may be held by a subject and the grant of which will confer on the grantee such privileges and benefits as can be enjoyed therein subject to the *jus publicum*. (2) The *jus publicum*, the royal prerogative by which the king holds shores and navigable rivers for the common use and benefit, and cannot be transferred to a subject, or alienated, limited or restrained by mere royal grant without an act of parliament. The king's grant therefore, although it may vest the right of soil in a subject, will not justify the grantee in erecting such permanent structures thereon as to disturb the common rights of navigation; and such obstruction, notwithstanding such grant, is held to be a public or private nuisance as the case may be. *Com. v. Alger*, 7 Cush. 53. The king takes this right of soil in trust for the public, so far as fishing is concerned, and although the king may grant

away this right of soil to another, yet his grantee will take it subject to the same trust; and by such grant however comprehensive in its terms, the public . . . cannot be deprived of their common rights. *Weston v. Sampson*, 8 Cush. 347, 352, *Dunham v. Lamphere*, 3 Gray, 268, 271, *Moore v. Sanford*, 151 Mass. 285, 7 L. R. A. 151 The right of soil must in all cases be considered as subject to the public right of passage And any grantee of the crown must of course take subject to that right. *Colchester v. Brooke*, 7 Q. B. 339, 374." This language is quoted in a recent case, before the New Hampshire court,¹³ wherein the plaintiffs claimed that the defendants in using the water of the Connecticut river at the Olcott Falls for manufacturing purposes, impaired the navigable capacity of the river at that point for the floatage of logs, to the injury of their business. It appears that under the act incorporating defendants, title to the shore lands and subaqueous land had been conveyed to them by the state; together with the right of diverting the water to the wheels of its mill. Defendant's counsel contended that "The grant of the right to build a dam, necessarily implies the right to cause some obstruction to the passage of logs . . . subject to the implied limitation that the dam must be so built as to create no obstructions except such as are reasonably necessary to the beneficial use and maintenance of the dam for manufacturing purposes." The court seems to have found that there was in fact no impairment of the floatage capacity of the river and the plaintiff's bill was dismissed, but the doctrine contended for by defendant was not upheld. On the contrary the court in an extended opinion sustained the view that the public right of navigation was paramount to any right of user for manufacturing purposes granted by defendant's charter, pointing out at the same time that the riparian owner, by virtue of his ownership had all the rights conferred on

(12) Thus in Michigan where the riparian owner owns to the thread of the stream his title to the sub aqueous land does not permit him to use the stream so as to interfere with its use for any of the purposes of navigation, and the floatage of logs and lumber is such a purpose. *Moore v. Sanbourne*, 2 Mich. 519 *Thunder Bay River Booming Co. v. Speechley*, 31 Mich. 336, *Buchanan v. Grand River Log Co.*, 48 Mich. 364; *White River Log & Booming Co. v. Nelson*, 45 Mich. 578; and see also 62 Mich. 636.

(13) *Connecticut River Lumber Co. v. Olcott Falls Co.*, 65 N. H. 290, 13 L. R. A. 836.

the company so far as the use of the water was concerned. The following is the language of the court: "The riparian proprietors incorporated or unincorporated can change the natural condition of the stream so far as changes are possible without an infringement of the public right. The riparian title, including the right of altering the channel and using the water, does not include a right of total or partial discontinuance of the changeable (navigable?) way, of which the capacity of the stream in its natural condition is the measure. . . . In the present case the question of proper form, dimensions and place of a sluice, the jurisdiction of equity is as plain as in the case of a partition of water power between mill owners. . . . If a judicial location of a logway over a dam is necessary, the convenience of the defendants will be consulted so far as it reasonably may be without a violation of the public right to a way *as good as the stream would furnish in its natural condition.* (The italics are ours.)

Does the Riparian Owner's Right to Use Water for Power Stand on the Same Basis as His Right of Access to Navigability?—A question of the utmost importance is presented when the improvement of navigation results in the destruction or impairment of the riparian owner's right to the use of the water for power. We have seen that that right is subordinate to the public easement for the purposes of navigation. That it is subordinate however, does not necessarily mean, that when destroyed or impaired as the necessary result of the improvement of navigation the riparian owner would be entitled to no compensation. That his dam or other mill property might be destroyed as the abatement of a nuisance, when it impeded navigation without compensation is unquestioned; but the destruction of property for the purpose of maintaining the natural navigable capacity of a stream, is a very different thing from the destruction of property for the purpose of enlarging the natural capacity of the stream for navigation. We have found no

case where this question has been decided. But there is no lack of decisions upon questions more or less analogous. Thus it has been held by many courts that where the riparian owner's right of access to navigability is cut off as the result of the improvement of navigation, he cannot recover any damages therefor. The Supreme Court of the United States has taken this view. The construction of St. Mary's canal, or rather what is known as the new south pier a portion of that canal was completed in 1881, and resulted in excluding the plaintiff from access from his upland within the projected lateral lines thereof to navigable water. Before the construction of the pier he had a water frontage of about 400 feet. When the pier was constructed the plaintiff attempted to use it for the purpose of landing freight thereon, in order to convey it to his upland. He was prevented from so doing by the defendant, the United States engineer in charge of the work. Under the law of Michigan the title of the plaintiff extended to the thread of the stream, and he brought ejectment against the defendant, claiming damages in the sum of \$35,000. Mr. Justice Harlan, writing the opinion of the court said: "It is the settled rule in Michigan that the title of the riparian owner extends to the middle line of the lake or stream of the inland waters. *Webber v. Pier Marquette Boom Co.*, 62 Mich. 636, and authorities there cited. But it is equally well settled in that state, that the rights of the riparian owner are subject to the public easement or servitude of navigation. *Lorman v. Benson*, 8 Mich. 18. *Ryan v. Brown*, 18 Mich. 195. So that, whether the title to submerged land of navigable waters is in the state or in the riparian owners it was acquired subject to rights which the public have in the navigation of such waters. The primary use of the waters and the lands under them is for purposes of navigation and the erection of piers in them to improve navigation for the public is entirely consistent with such use, and infringes no right of the riparian owner. Whatever the nature

of the interest of the riparian owner in the submerged lands in front of his property bordering on a public navigable river his title is not as full and complete as his title to fast land which has no direct connection with the navigation of such water. It is a qualified title, a bare technical title, not at his absolute disposal as is his upland, but to be held at all times subordinate to such use of the submerged lands and of the waters flowing over them as may be consistent with or demanded by the public right of navigation. In *Lorman v. Benson*, above cited, the Supreme Court of Michigan, speaking by Mr. Justice Campbell, declared the right of navigation to be one to which all others was subservient. The learned counsel for the plaintiff frankly states that compensation cannot be demanded for the appropriation of the submerged lands in question, and that the United States under the power to regulate commerce, has an unquestioned right to occupy them for a lawful purpose and in a lawful manner. This must be so—certainly in every case where the use of the submerged lands is necessary or appropriate in improving navigation. But the contention is that compensation must be made for the loss of the plaintiff's access from his upland to navigability, incidentally resulting from the occupancy of the submerged lands, even if the construction and maintenance of a pier resting upon them be necessary or valuable, in the proper improvement of navigation. We cannot assent to this view. If the riparian owner cannot enjoy access to navigability because of the improvement of navigation by the construction away from the shore line of works in a public navigable river, or water, and if such right of access ceases alone for that reason to be of value, there is not within the meaning of the constitution a taking of private property, but only a consequential injury to a right which must be enjoyed, as was said in the *Yates* case, "in due subjection to the rights of the public"—an injury resulting incidentally from the exercise of a governmental power

for the benefit of the general public and from which no duty arises to make or secure compensation to the riparian owner. The riparian owner acquired the right of access to navigability, subject to the contingency that such right might become valueless, in consequence of the erection under competent authority of structures on the submerged land in front of his upland property for the purpose of improving navigation. When erecting the pier in question, the government had no object in view except in the interests of the public to improve navigation. It was not designed arbitrarily or capriciously to destroy rights belonging to any riparian owner. What was done was manifestly necessary to meet the demands of interstate and international commerce.

In our opinion, it was not intended that the paramount authority of congress to improve the navigation of the public navigable waters of the United States should be crippled by compelling the government to make compensation for the injury to a riparian owner's right of access to navigability, that might incidentally result from an improvement ordered by congress."¹⁴

(14) *Scranton v. Wheeler*, 179 U. S. 164, 45 L. ed. 137. See also *South Carolina v. Georgia*, 93 U. S. 4, 23 L. ed. 782; *Stockton v. Baltimore & N. Y. R. Co.* 32 Fed. 9. In *Hawkins' Point Light House Case*, 39 Fed. Rep. 77, where the United States had placed a light house in the water in front of property, the owner of which had by the state statutes, the title to the soil and the right to wharf out, the court says: It is by no means true that any dealing with a navigable stream which impairs the value of the rights of riparian owners gives them a claim for compensation. The contrary doctrine, that in order to develop the greatest public utility of a water way private convenience must often suffer without compensation has been sanctioned by repeated decisions of the supreme court. If necessary to the free navigation of the stream the owner will be prevented from extending any structure into it. See also *Gibson v. United States*, 166 U. S. 269; 41 L. ed. 996. In *United States v. Lynan*, 188 U. S. 444, 47 L. Ed. 539, the majority of the court held that "the turning of a valuable rice plantation, into an irreclaimable and valueless bog as the necessary result of the improvement of navigation undertaken by the United States government, is a taking of the land within the meaning of the 5th amendment. Three of the justices dissented holding that no state can lawfully destroy the capacity rule laid down in *Scranton v. Wheeler*.

If then the right of access is regarded as public, rather than private property by the highest court in the land, there seems no reason to anticipate that the same court would not regard the right to the use of water power as falling within the same category.

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The rule in New York is practically the same as that enunciated in *Seranton v. Wheeler*, Gould v. Hudson R. Co., 6 N. Y. 552; *Lansing v. Smith*, 4 Wend. 21, 21 Am. Dec. 89; *People v. Tibbetts*, 19 N. Y. 523; *People, Loomis v. Canal Appraisers*, 33 N. Y. 461; *Smith v. Rochester* 92 N. Y. 463; *Langdon v. New York*, 93 N. Y. 129; *Sage v. N. Y.*, 154 N. Y. 61, 38 L. R. A. 606. In the case last cited the court said: The only limitation that is placed by the courts of the United States upon the power of the several states over lands covered by tide water within their respective limits is not for the protection of the riparian owners, but to protect the public in the use of such waters, and congress in its paramount right to control commerce Although as against individuals, or the unorganized public riparian owners have special rights as to tide way that are recognized and protected by law, as against the general public as organized and represented by government they have no rights that do not yield to commercial necessities except the right of pre-emption, when conferred by statute, and the right of wharfage when protected by a grant. . . . The common law recognizes navigation as an interest of paramount importance to the public. Thus when the king used to grant an exclusive right of fishing in navigable tide water, as once he lawfully might, if in the course of time, the nets or wiers interfered with navigation, they became a nuisance and could be abated as such. The rule in the majority of the states, however, seems to be more favorable to the riparian owner, recognizing his right of access to navigability as private property which cannot be taken from him by the state without compensation. Note to *State ex rel Denney v. Bridges*, 40 L. R. A. 593.

The English Rule. The English courts also recognize the right of access to navigability as private property vested in the riparian owner.

"Freeman says, (English Const. 2nd ed. pp. 139 et. seq. The tracts of unoccupied land were originally the property of the public but by the time of or after the conquest this land was known as *terra regis*, and disposed of by the king as he chose. After *Magna Charta*, the character of the land began to change again, until now the land is not the king's with power in him to dispose of it, but in the people and under the control of parliament. He further states that by custom each new state that by custom, each new sovereign is now compelled to grant his individual rights in the unoccupied land to the people. . . . The first case involving the

right of access was decided in 1843, after this change had been accomplished. In *Rose v. Groves*, 5 Mann & G. 613, 6 Scott N. R. 645, 1 Dowl & L61, 12 L. J. C. P. N. S. 251, 7 Jurn. 951, access from the river to plaintiff's public house was obstructed by timber moored by defendants in the stream in front of plaintiff's bank. During the argument Maul J. said: This was not an action for obstructing the river, but for obstructing access to plaintiff's house. And it was held that the declaration was good after verdict. *Kearns v. Cordwalners' company*, 6 C. B. N. S. 388, 28 L. J. C. P. N. S. 285, 5 Jurn. M. S. 1,216, was a proceeding between licensor and licensee based upon contract that the licensor should apply for leave to erect a landing place beside a wharf, and the question was as to whom application must be made *Cockburn, C. J.* during the argument stated that the conservators of the river had a right to authorize the erection so far as the public was concerned, but the difficulty he felt was as to whether or not they could override private rights. In his opinion, he said, it appeared to him that no private rights were interfered with; that the erection was not one which was immediately brought into contact with or would directly interfere with access to the premises of adjoining owners, and that being so the only rights interfered with were public rights which the conservators could control. But he says that if the obstruction operated a private particular injury to abutting owners, according to *Rose v. Groves*, they would have a right of action.

If a railroad is built between a wharf and the water, the wharf is injured within the meaning of a statute requiring compensation to be made in such cases. *Bell v. Hull & S. R. Co.*, 6 Mees & W. 699, 2 Ry Cases 279.

In *Attorney Gen. v. Conservators of the Thames* 1 Hem & Ml, 8 Jurn. N. S. 1,203, 11 Week Repts. 163, the judge says the right of a private owner of a private wharf to have access thereto is a totally different right from the public right of passing and repassing along the river. The existence of such a right of access was recognized in *Rose v. Groves*. The wharf owner claimed that it had a right to the wharf, coupled with a right of access to the river, and the judge agreed that if this right of access was taken away it would be entitled to an injunction. But he says, the access was not blocked up, the wharf was only made less accessible. That is a mere interruption to the navigation of the river which they enjoyed in common with the public, and not as part of their special right of access. In *Buccleuch v. Metropolitan Bd. of works* L. R. 3 Exch. 306, where an embankment for a road was built along the shore so as to cut the riparian owner off from access to the water, the court of exchequer held that he was entitled to damages. See also *Metropolitan Bd. of Works v. McCarthy*, 7, H. L. 243, 43 L. J. C. P. N. S. 385, 31 L. T. N. S. 132. *Original Hartlepool Collieries Co. v. Gibb* L. R. 5 Ch. Div. 713;

Tide Waters. In *Lyon v. Fishmongers Co.* L. R. 10 Ch. 679, 44 L. J. Ch. M. S. 747, 33 L. T. N. S. 146, 24 Week. Rep. 1, it was said: The rights of a riparian proprietor, so far as they relate to natural streams exist *jure naturae*, because his land has by nature the advantage of being washed by the stream;

If the facts of nature constitute the foundation of the right, I am unable to see why the law should not recognize and follow the course of nature in every part of the stream. *Bell v. Quebec*, L. R. 5 App. Case. 98, 49, L. J. P. C. N. S. 1, 41 L. J. 451, *Atty. Gen v. Wemyss*, L. R. 13 App. Cas. 192." See note 40 L. R. A. 593.

INJUNCTION — RESTRAINING PROCEEDINGS UNDER PENAL ORDINANCES.

CANON CITY v. MANNING.

Supreme Court of Colorado, April 6, 1908.

The ordinances of a city, prohibiting the sale and giving away of intoxicating liquors, declaring that every place where intoxicating liquors are sold or dispensed shall be a nuisance, imposing fines for the violation of ordinances, and authorizing public officers to abate such nuisances by closing the place where intoxicating liquors are dispensed, and preventing any person from entering the same, etc., do not authorize the officers of the city to declare *ex parte* that a lodge maintaining a club for the social enjoyment of the members thereof, where liquors are dispensed to them and guests, each member paying for that consumed by himself and guest, violates the ordinances, and the officers cannot close the clubrooms and prevent the members of the lodge from entering the same, and equity will restrain the officers from so doing, since the lodge has no adequate remedy at law.

The Benevolent & Protective Order of Elks of the United States of America is a fraternal, social, and benevolent society having many subordinate lodges, one of which is located at Canon City. This lodge is a voluntary society, not incorporated, and consists of upwards of 325 members, and is supported by the fees and dues paid in by its membership. The rules of the order prescribe the qualifications for membership. Pursuant to the constitution and by-laws of the order, it maintains clubrooms at Canon City for the social enjoyment of its members, where liquors are dispensed to them, each paying for that consumed by himself or his guests in a sum fixed by the board of control. The membership of the club is limited to members of the organization in good standing. None but members of the order or their guests are admitted to the club, and no person not a member of the order who is a resident of Canon City or the immediate vicinity can be admitted. Guests, except members of the order, are not permit-

ted to spend any money in the club. The club has quite an elaborate set of rules for the government of its members and the management of its affairs, and is part and under the control of the Canon City lodge of the order. It is not incorporated, and its affairs are managed by a board of control appointed in accordance with the rules of the order and the rules and regulations of the club. The club is conducted in an orderly manner, and no conduct calculated to disturb the peace is permitted. Billiard and card tables are maintained for the use of the members and guests. The rooms are supplied with magazines and other reading matter. Canon City has ordinances prohibiting the sale or giving away of intoxicating liquors within its corporate limits by any person, except regularly licensed druggists, duly licensed to sell liquors for medicinal, mechanical, and chemical purposes. One of these ordinances declares that every place within the limits of Canon City where intoxicating liquors are sold or dispensed, except by druggists duly licensed, is a nuisance. Penalties in the way of fines are provided for the violation of these ordinances. One of the provisions of the ordinance declaring places where liquors are sold or dispensed nuisances is: "The city marshal and all police officers of said city shall abate said nuisance by securely closing such place and preventing any person and all persons from entering the same except for the lawful removal of such liquor, until all liquor or any or every kind hereinbefore mentioned shall have been removed therefrom, and until the owner of said place shall have given bond to the said city in a form and with sureties to be approved by the city council of said city of Canon City, in the penal sum of twenty-five hundred dollars, conditioned or permitted to be used for any purpose hereinbefore specified as constituting it a nuisance." Under this provision, the city, through its mayor and marshal, gave notice to the club to stop the sale and dispensing of liquors to its members within the rooms occupied by it, and that, unless such sales were stopped within a time specified, the provisions of the ordinances of the city with respect to the sale and dispensing of intoxicating liquors would be rigidly enforced against the club. Up to the time of giving such notice, no prosecution under any of the ordinances in question had ever been commenced or prosecuted against the club or its members. Defendants in error, constituting the board of control of the club, thereupon commenced an action against the city of Canon City and its mayor and marshal to restrain them, except by some

regular form of judicial proceeding in a court of competent jurisdiction, from closing the clubrooms or preventing any member or members from entering them, or interfering with the full and entire enjoyment of such rooms by the members. The complaint filed stated substantially the facts above set forth. To this complaint a demurrer was filed by the defendants, which challenged the complaint upon the grounds, among others, that the plaintiffs had no capacity to sue, and that the complaint did not state facts sufficient to constitute a cause of action, or as a basis for relief of any kind. This demurrer was overruled. The defendants thereupon answered and a trial was had before the court. The facts established under the issues made by the pleadings were substantially as above recited. Judgment was rendered for the plaintiffs, enjoining the defendants, except by some regular form of judicial proceeding in a court of competent jurisdiction,* from closing the clubrooms or preventing any member or members of the club or their guests from entering such rooms, and to refrain and desist from interfering with the full and entire enjoyment of such rooms by the members of the club or their guests. The defendants bring the case here for review on error.

GABBERT, J. (after stating the facts as above): The first error assigned on behalf of defendants is that the court erred in overruling their demurrer to the complaint, which challenged the capacity of plaintiffs to bring the action. Presumably, if there was any merit in this contention, it appeared upon the face of the complaint. By answering to the merits, the defendants waived that question. It has been repeatedly decided that where a demurrant wishes to take advantage of any supposed error in overruling a demurrer to a complaint upon grounds which under our Civil Code constitute grounds for demurrer, which appear upon the face of the complaint, he must, except for want of acts or jurisdiction, let final judgment be entered, for by afterwards answering to the merits he cannot, except for the two defects mentioned, raise such questions in connection with his answer. *Sams Automatic Car Coupler Co. v. League*, 25 Colo. 129, 54 Pac. 642; *Diamond Rubber Co. v. Harryman*, 39 Colo. —, 92 Pac. 922.

It is next urged that the complaint shows that the plaintiffs have attempted to invoke the aid of a court of equity to prevent the enforcement of a penal ordinance, and that for this reason, and also because the testimony establishes this fact, the judgment is

erroneous. The judicial enforcement of a penal ordinance cannot be inhibited by a court of equity. *Denver v. Beede*, 25 Colo. 172, 54 Pac. 624; *Adams v. Cronin*, 29 Colo. 488, 69 Pac. 590, 63 L. R. A. 61; *Olympic Athletic Club v. Speer*, 29 Colo. 158, 67 Pac. 161. There may be exceptions to this rule, as suggested in the above cases, but this case does not fall within the exception, so far as the judicial enforcement of the ordinance in question is involved. Neither is that question the vital one in this case. The plaintiffs did not seek a judgment inhibiting the defendants from judicially enforcing such ordinance, nor did the judgment rendered inhibit the defendants from so doing. On the contrary, the questions presented by the complaint and on the facts established at the trial are: (1) May the city authorities summarily close the clubrooms and exclude the members of the club therefrom; and (2) if not, may they be enjoined from so doing?

The defendants claim that they have the right, by virtue of the ordinances of the city, to close the clubrooms and exclude its members therefrom, and do not deny the averments of the complaint, to the effect that it was their intention and purpose to take these steps. In support of their authority and right to do so, it is claimed that the clubrooms managed by the plaintiffs are maintained in violation of the ordinances of the city inhibiting any place to be kept within its limits wherein intoxicating liquors are sold or dispensed to members of the club occupying such place. That question is not the material or crucial one involved, and we shall express no opinion upon it. We are not concerned with the guilt or innocence of plaintiffs, neither can that question, under our rulings in the *Beede* and other cases, be determined in this proceeding. The first important question to determine, in order to solve what we have indicated are the only ones in the case, is whether the defendants may determine for themselves that the club is violating the ordinances of the city, and proceed summarily to enforce its *ex parte* orders against it. This question must be answered in the negative. The fact that members of the organization represented by plaintiffs meet in their clubrooms is not a violation of the ordinances. Neither is the mere storage of liquors in such rooms contrary to any provision of such ordinances. The violation of such ordinances, if any there be, consists in dispensing such liquors to the members of the club. Whether or not that is a violation cannot be determined by the city officials, but

only by a court of competent jurisdiction, wherein plaintiffs are afforded an opportunity to be heard, so that the question of whether they are violating the ordinances of the city can be judicially determined. By the terms of the ordinances which the defendants say they proposed to enforce, no such opportunity is afforded the plaintiffs. Defendants propose ex parte to determine that the ordinances of the city have been violated, and pursuant to that conclusion contend they have the right to close the clubrooms and exclude the members therefrom. Such a proceeding as that cannot be upheld. Persons, even though they be officials of a municipality, may not take the law into their own hands, however justifiable they may think such a course may be to prevent infringement of the law. Such a course must inevitably result in bringing about conditions destructive to the peace of a civilized community. If it can be done in one case, it may in another; and thus there would be no limit to the unlawful means which might be resorted to for the purpose of punishing alleged infringements of the law, although those engaged in doing so would also be violating it. A man's property cannot be seized, nor can he be punished, except for a violation of the law, and whether he has been guilty of such violation as justifies the seizure of his property, or the infliction of punishment, can only be determined by a court of competent jurisdiction, where he is afforded an opportunity to be heard before judgment is pronounced against him. *Darst v. Peopie*, 51 Ill. 286, 2 Am. Rep. 301; *Earp v. Lee*, 71 Ill. 193; *Baldwin v. Smith*, 82 Ill. 162. The law provides a method whereby the unlawful selling of liquor may be judicially determined and judicially punished. In the present case the ordinances of Canon City make such provision

Having concluded that the ordinances cannot be enforced in the manner threatened by defendants, the next question is whether they may be enjoined from carrying their threat into execution. This question must be answered in the affirmative. The reason upon which the *Beede* and other cases decided by this court, wherein it is held that the judicial enforcement of a penal ordinance could not be enjoined, rests, is that equity can only be invoked when there is no plain, adequate, and complete remedy in the law courts of which the party invoking its aid can avail himself. That condition is not present in the case at bar. On the contrary, it is entirely absent, for the obvious reason that no opportunity is afforded by the provisions of the ordinance

under consideration whereby the plaintiffs may be heard on the question of whether or not the dispensing of liquors in their clubrooms in the manner set out in their complaint, and as established by the facts is a violation of the ordinances of the city inhibiting the sale of liquors within its limits. They must either submit to the ex parte determination of the city officials that they are violating the ordinances of the city and permit their clubrooms to be closed, and the members excluded therefrom, and then bring an action to be reinstated in the possession of their rooms, or they must resort to force when the city authorities undertake to enforce the provisions of the ordinances against them. Certainly the first course does not afford an adequate remedy at law, because that expression does not mean that such a remedy is afforded by quietly submitting to an alleged wrong, and then bringing an action against the alleged wrongdoer to redress it. Neither is the second expedient one to which the law will compel a party to resort by refusing him protection in the first instance, because that course invites violence and a breach of the peace. Perhaps he might justify such action if called to account therefor, but that is not an adequate remedy a law to afford protection against the illegal invasion of his rights. The general rule is that if, in order to protect the rights of a party an action at law does not afford a plain, speedy, and adequate remedy whereby the whole mischief of which he complains may be reached, and, his rights, both present and future, be secured in a perfect manner by the judgment of a court at law, he may invoke the interposition of equity for his protection. 1 Story's Equity Jurisprudence, § 33. Applying this rule, it is clear that this case does not fall within the rule laid down in the *Beede* and other cases cited by counsel representing the city authorities. The amendment to section 143 of Mills' Annotated Code, which provides that no writ of injunction shall issue to restrain the enforcement of a penal ordinance, does not apply, because that can only be construed to mean that no writ of injunction shall issue to restrain the judicial enforcement of such ordinance. There are doubtless instances where city authorities would be justified in employing summary methods because of the emergency of the situation to prevent infringement of the law, or to prevent parties from taking steps which would inevitably lead to a violation of the law, or to protect the health of the public, or where, for the protection of the public, police surveillance must be exercised and prompt

action taken; but no such emergencies are presented in the present case. Whether or not the plaintiffs and those whom they represent are violating the ordinances of the city can be determined judicially, and, if they are so found guilty, the judgments to that effect can be enforced by judicial process, without jeopardizing the safety of the public in the slightest degree, and any attempt on wise cannot be permitted. In reaching this the part of the city authorities to do other conclusion, we must not be understood as indicating that a judgment of a court to the effect that the clubrooms could be closed and the members excluded, would be upheld, or that the dispensing of liquors in these clubrooms to members of the organization represented by plaintiffs in the circumstances established in this case is not a violation of the ordinances of the city inhibiting the sale of liquors within its limits. It will be time enough to determine either, or both, of these questions, when presented by an appropriate proceeding. What we do determine is that, in the circumstances of this case, the city authorities cannot enforce the provisions of the ordinances involved extrajudicially, and that they may be enjoined from attempting to do so.

The judgment of the district court is affirmed.

Affirmed.

CAMPBELL and HELM, JJ., concur.

NOTE.—Right of Equity to Restrain the Enforcement of the Criminal Law Where Such Enforcement is Vexatious, Oppressive and a Misapplication of the Law.—We had occasion to refer to this ever-increasingly important question in a recent editorial, 67 Cent. L. J. 297. We desire to examine it more analytically.

The principal case very properly separates the question. The two aspects presented by Justice Gabbert are: (1), Restraining judicial enforcement of criminal law; and (2), restraining the "bureaucratic" enforcement of the criminal law: that is, enforcement by rules, regulation and specific instructions from police boards to suppress a crime by raids, or repeated arrests without trial or by the confiscation of the utensils of crime or the obstruction of the locations where crime is wont to be committed.

Let us make clear what we are now discussing in this note. We are not discussing, and in fact, will consider as settled the following questions of law: (1) Equity has no criminal jurisdiction; (2) Equity will not enjoin the commission of a criminal act; (3) Equity will not restrain the enforcement of the criminal law, (4) except where the statute on which proceedings are based is unconstitutional and the enforcement of the law would result in irreparable injury to defendants' property rights; (5) that

even in such cases where the injury affects personal as distinguished from property rights, equity will not interfere.

What we are discussing is a further exception to the rule that equity will not enjoin the enforcement of the criminal law, to-wit, where such enforcement is purely vexatious and injuriously affects property rights. And we have already noted two aspects of this question: (1) the judicial enforcement, and (2), the bureaucratic enforcement of the criminal law.

We shall consider first the right to restrain the enforcement of the criminal law by boards through other than judicial proceedings. The principal case is authority for the rule that even where a criminal law gives authority to police officers to abate a nuisance as, for instance, a place where intoxicating liquors are sold in violation of law, the board of police cannot ex parte declare such a place to be a nuisance and direct an officer to close it up. The fundamental reason for this proposition is that it gives judicial power to a board or bureau without authority of law, and thus, where property is affected, deprives him of his property (or its use) without due process of law. So also in the case of *Ulster Square Dealer v. Fowler*, 111 N. Y. Supp. 16, 67 Cent. L. J. 297, the court held that a police board could not order the suppression of such issues of publication which might be deemed libelous as such enforcement of the criminal law amounted to a continuous trespass.

When we come to consider the question whether equity can enjoin the judicial enforcement of the criminal law when such enforcement becomes vexatious, oppressive and unlawfully deprives the defendant of valuable property rights, there is some disagreement. The position we reached in our editorial (67 Cent. L. J. 297), was that equity could interfere in such cases "on the ground that the attempted prosecution was purely vexatious and a misapplication of the law resulting in injury to the plaintiff's property rights," citing: *Atlanta v. Gas Light Co.*, 71 Ga. 106; *Shinkle v. Covington*, 83 Ky. 420; *Yellowstone Kit v. Wood*, 18 Tex. Civ. App. 683, 43 S. W. 1068. We might also call attention to two important cases which we failed to cite in the editorial referred to: *Port of Mobile v. Railroad Co.*, 84 Ala. 115; *Georgia, etc., R. R. v. Atlanta*, 118 Ga. 486, 45 S. E. 256. In the *Port of Mobile* case the railroad company successfully enjoined the enforcement of an ordinance declaring it unlawful to load or unload cars in the public streets on the ground that the enforcement of such ordinance against defendant was a violation of its chartered rights. In the *Gas Light Co.* case the city was enjoined from enforcing a valid ordinance against tearing up streets without a permit, against defendant's agents for the same reason. In all these cases there was a misapplication of the law or a mischievous attempt to affect the civil rights of the defendant by proceedings against its agents for technical violation of the criminal law. In the *Covington* case fifteen criminal proceedings had been brought against defendant. Every case resulted in a fine too small to permit of an appeal. The enforcement of the law was enjoined as malicious and vexatious and affecting defendant's property rights. The case of *Denver v. Beede*, 25 Colo. 172, 54 Pac. 624, is apparently *contra*, but there the court lays down a further restriction on the operation of

the rule here considered, holding that "a court of equity will not, by injunction, restrain a criminal prosecution, except where it becomes necessary to protect a party from oppressive and vexatious litigation, and then only after the controverted right has been determined in a previous action, in favor of the party applying for the injunction. This case was a prosecution for violation of the Sunday law in keeping defendant's theater open on Sunday. As this was only the first arrest and the first prosecution, the court was perfectly justified in its ruling. But even here courts of equity have sometimes interfered. Thus, in the case of *Manhattan Iron Works v. French*, 12 Abb. N. Cas. (N. Y. 1882), 446, the court held that equity could enjoin a police board from interfering with the business and property of a manufacturer engaged in continuing the business of manufacturing on Sunday, even though such proceeding is based on a valid Sunday law, where such work is a "work of necessity" and to stop its operation even for one Sunday would work irreparable loss. The broad ground for the exercise of this jurisdiction is stated by the court to be that "while equity will not enjoin an arrest for crime, it will interfere to prevent the destruction of property even though in effect, it enjoin an arrest for crime. This was the ground on which the case of *Barlow v. Vestry of St. Mary Abbots*, (Chan. Div.), 48 Law T. R. (N. S.), 348, was decided, where the court enjoined a magistrate from tearing down a wall, which he alleged was over the building line under an ordinance giving him authority to do so where obstructions were placed upon the highway.

Other cases holding threatened arrests illegal, oppressive and injurious to property rights and therefore subject to be enjoined by a court of equity might be consulted. *La Harpe v. Elm Township, etc., Co.*, 69 Kans. 97, 76 Pac. 448; *Dobbins v. Los Angeles*, 195 U. S. 223, 25 Sup. Ct. 18 (reversing 139 Cal. 179, 72 Pac. 970, 96 Am. St. Rep. 95.) In the last case cited the Supreme Court of the United States held that "although a criminal ordinance may be lawful on its face and apparently fair in its terms, yet if it is enforced in such a manner as to work a discrimination against a part of a community for no lawful reason, such exercise of power will be invalidated by the courts;" citing *Yick Wo v. Hopkins* 118 U. S. 356.

It is to be borne in mind, however, that it is only where the enforcement of the criminal law is clearly vexatious and irreparably injurious to property rights that equity will enjoin a police board or officer or court from enforcing the criminal law. In all other cases equity will leave defendants to their remedies at law. *Burch v. Cavanaugh*, 12 Abb. Pr. (N. S.), 410; *Brown v. Birmingham*, 140 Ala. 590; *Kramer v. Police Department*, 53 N. Y. Sup. Ct. 492; *Davis v. Society*, 75 N. Y. 362; *Louisville, etc., R. R. v. Barrall*, 25 Ky. Law Rep. 1395.

HUMOR OF THE LAW.

"I have certainly received the subpoena, but I shall not appear—could not, in fact," the Lady Josephine explained. "Not only am I not socially acquainted with Mr. Justice Barge-deane, but the whole tone of his communication is so impossible that I absolutely refuse to know him."—*Sporting Times*.

WEEKLY DIGEST.

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1. **Action—Waiver of Tort.**—Where standing timber has been wrongfully cut and removed, the owner may waive the tort and sue in assumpsit for the value of the timber.—*Witaker v. Poston*, Tenn., 110 S. W. Rep. 1019.

2. **Adverse Possession—Constructive Possession.**—In trespass to try title, the occasional cutting of wood and pasturing of stock on uninclosed land by one claiming by adverse possession was not such actual possession and occupancy as would affect the constructive possession of the true owner.—*Haynes v. Texas & N. O. R. Co.*, Tex., 111 S. W. Rep. 427.

3. **Aliens—Naturalization.**—Under Rev. St. Sec. 2165 (U. S. Comp. St. 1901, p. 1329), it was competent for an alien minor over eighteen years of age to make a declaration of intention to become a citizen of the United States, and such a declaration is sufficient basis for a final application for citizenship under the proviso to section 4, Naturalization Act June 29, 1906, c. 3592, 34 Stat. 596 (U. S. Comp. St. Supp. 1907, p. 420).—*In re Gross*, U. S. D. C., E. D. N. Y., 160 Fed. Rep. 739.

4. **Appeal and Error—Bill of Exceptions.**—Where the abstract on appeal does not show that the bill of exceptions was filed by proper order of court duly entered, and that the bill was signed by the judge, only the record proper can be considered.—*Isaac A. Novinger & Son v. Quincy, O. & K. C. R. Co.*, Mo., 111 S. W. Rep. 515.

5. **Offer of Proof.**—Where a licensing board on the hearing of a remonstrance refuses to receive a part of the testimony offered, an offer of proof should be made that the appellate court may determine whether its rejection was erroneous or prejudicial.—*In re Phelps*, Neb., 116 N. W. Rep. 681.

6. **Bail—Forfeiture.**—That the principal in a bail bond forgot the date his case was set for trial, that he had no money with which to get to the place of trial, and that he was sick but not disabled, held not a sufficient excuse to warrant nonforfeiture of the bond.—*State v. Sandy*, Iowa, 116 N. W. Rep. 599.

7. **Bailment—Replevin.**—Where the bailor of

goods recovers a judgment for their full value against the bailee and has possession, the satisfaction of such judgment vests in the bailee sufficient property to enable him to maintain replevin against the bailor for possession.—*Bauer v. Hess*, N. J., 69 Atl. Rep. 966.

8. **Bankruptcy—Appealable Decisions.**—Under Bankr. Act, c. 541, sec. 25a, held, that an appeal will not lie to the United States Circuit Court of Appeals from a decree of the District Court reversing a referee's judgment requiring a bankruptcy trustee to account to the creditors in specified sums as the rental value of property, of which he permitted the bankrupt to retain use and possession.—*Bank of Clinton v. Kondert*, U. S. C. C. of App., Fifth Circuit, 159 Fed. Rep. 703.

9. **Conditional Sale Contracts.**—Notes executed for the price of property purchased by a bankrupt, providing that the title should remain in the seller until full payment, and that any equity acquired by the purchaser by reason of partial payments should stand pledged for the payment of the remainder and be held as trustee held valid, and enforceable contracts under the law of Louisiana, and to constitute liens after partial payments had been made.—*National Bank of Commerce v. Williams*, U. S. C. C. of App., Fifth Circuit, 159 Fed. Rep. 615.

10. **Discharge of Judgment.**—Where a debt was discharged by the bankruptcy of the debtor his liability upon the judgment therefor was also discharged, and an application for leave to issue execution thereon will be denied.—*Cohen v. Pinkus*, 111 N. Y. Supp. 82.

11. **Election of Trustees.**—It was not improper for the attorney for petitioning creditors, in bankruptcy proceedings against a corporation, to obtain proxies for use in the election of a trustee by means of letters containing no materially false statement of fact and asserting the claim of the corporation against its officers.—*In re Duryea Power Co.*, U. S. D. C., E. D. Pa., 159 Fed. Rep. 783.

12. **Jurisdiction.**—In bankruptcy proceedings the court's power to reconsider and revise its orders and decrees does not expire with the term at which they are made.—*In re Keyes*, U. S. D. C., D. Mass., 160 Fed. Rep. 763.

13. **Market Value of Assets.**—The fair market value of a corporation's assets for the purpose of determining its solvency when it committed an alleged act of bankruptcy was the value which the corporation might have realized on them for itself.—*In re Marine Iron Works*, U. S. D. C., E. D. N. Y., 159 Fed. Rep. 753.

14. **Nonprovable Claim.**—Under Bankr. Act, c. 541, sec. 11a, the bankruptcy court has no jurisdiction to restrain the prosecution of a suit against the bankrupt on a nonprovable claim.—*In re New York Tunnel Co.*, U. S. C. C. of App., Second Circuit, 159 Fed. Rep. 688.

15. **Petition to Revise Proceedings.**—A Circuit Court of Appeals cannot act on a petition to superintend and revise the proceedings of a District Court in bankruptcy, where the record does not contain a statement or finding of facts nor show whether the court determined the question sought to be reviewed as one of fact or law.—*Landry v. San Antonio Brewing Assn.*, U. S. C. C. of App., Fifth Circuit, 159 Fed. Rep. 700.

16. **Possession of Property.**—Where a bankrupt's receiver had held possession of the property in controversy under a lease to the bank-

rupt and had been wrongfully ejected, the bankruptcy court had jurisdiction of an action by the bankrupt's trustee to recover possession under the lease.—*Plaut v. Gorham Mfg. Co.*, U. S. D. C., S. D. N. Y., 159 Fed. Rep. 754.

17. **Suit by Trustee to Recover Property.**—A bill by a trustee in bankruptcy held to state a cause of action for the recovery of the value of goods removed by defendants from the bankrupt's stock immediately prior to the bankruptcy.—*Ludvig v. American Woolen Co.*, U. S. D. C., S. D. N. Y., 159 Fed. Rep. 796.

18. **Sureties of Bankrupt.**—A surety or indorser for a bankrupt is a creditor within the meaning of the bankruptcy law.—*Huttig Mfg. Co. v. Edwards*, U. S. C. C. of App., 160 Fed. Rep. 619.

19. **Time for Filing Claim.**—Though creditors of a bankrupt did not file their claim within one year following the adjudication, as required by statute, an assignment thereof filed by the assignee within the year may be treated as sufficiently presenting the claim so as to save it by amendment made after the year.—*Bennett v. Anderson v. American Credit Indemnity Co.*, U. S. C. C. of App., Sixth Circuit, 160 Fed. Rep. 624.

20. **Wage Earners.**—A music teacher giving lessons at so much an hour is not comprehended by the bankruptcy act provision that wage earners whose compensation does not exceed \$1,500 a year shall not be subject to involuntary bankruptcy.—*First Nat. Bank v. Barnum*, U. S. D. C., M. D. Pa., 160 Fed. Rep. 245.

21. **Banks and Banking—Compensation of Receivers.**—An order allowing three temporary receivers for a trust company \$75,000 each and \$75,000 to their counsel held excessive, and should be reduced to \$20,000 for each of the receivers and \$20,000 for their counsel.—*People v. Knickerbocker Trust Co.*, 111 N. Y. Supp. 2.

22. **Forgery.**—The time and place of the forgery of a check is immaterial to the payee bank's liability to the maker for paying the same unless the forgery was committed under such circumstances as to show negligence on the part of the drawer.—*Harmon v. Old Detroit Nat. Bank*, Mich., 116 N. W. Rep. 617.

23. **Bills and Notes—Actions by Assignees.**—In an action by an assignee of a note given for the price of land sold by the payee to the maker, the maker cannot have any judgment over against the assignee, based on the wrongful acts of the payee, caused by his removing timber from the land, trespassing thereon, etc.—*Cariton v. Smith*, Ky., 110 S. W. Rep. 873.

24. **Cancellation of Instruments—Conditions Precedent.**—A lessor in a lease giving the lessee the right to make improvements and to purchase the premises held required on rescinding the contract to compensate the lessee for the improvements made.—*Swanston v. Clark*, Cal., 95 Pac. Rep. 1117.

25. **Failure of Consideration.**—Where the consideration of a deed is the grantee's undertaking to support the grantor, on failure of consideration, the grantor can sue at law as the consideration becomes due or in equity to cancel the contract.—*Whitaker v. Trammell*, Ark., 110 S. W. Rep. 1041.

26. **Carriers—Duty of Shipper to Inspect Car.**—It is not the duty of a shipper to inspect a car furnished by a carrier, or to exercise care to know whether the car is in condition, but he may assume that the carrier would not have directed the placing of the goods in the car un-

less it was suitable.—*Cleveland, C. C. & St. L. Ry. Co. v. Louisville Tin & Stove Co., Ky.*, 111 S. W. Rep. 358.

27.—*Injuries to Passengers.*—In an action by a passenger for personal injuries, he must show the injuries resulted from neglect in the conduct of the business or defects in the appliances.—*Ginn v. Pennsylvania R. Co., Pa.*, 69 Atl. Rep. 992.

28.—*Notice of Damage to Live Stock.*—Shrinkage in the weight of cattle due to unnecessary confinement in cars held within the stipulation of a shipping contract making a notice of loss to the railway company before the intermingling of the cattle with other stock a condition precedent to recovery.—*Atchison, T. & S. F. Ry. Co. v. Wright, Kan.*, 95 Pac. Rep. 1132.

29.—*Stipulation in Bill of Lading.*—A clause in a carrier's bill of lading that no carrier or party in possession shall be liable for loss or damage to the goods by fire only applies where the carrier is in possession at the time of the fire.—*Boiles v. Lehigh Valley R. Co., U. S. C. C. of App., Second Circuit*, 159 Fed. Rep. 694.

30.—*Constitutional Law—Personal Rights.*—The right to labor in a certain way or to pursue a certain calling or profession depends on the power of the state to prohibit or regulate such occupation, calling, or profession.—*Ex parte Donnellan, Wash.*, 95 Pac. Rep. 1085.

31.—*Contracts—Legality.*—Where a lease of grazing land contemplated the maintaining of an inclosure around a large body of government land, in violation of Act Cong. Feb. 25, 1855, c. 149, in addition to other lands of which plaintiff was in lawful possession, the contract being indivisible was void in toto.—*Lingle v. Snyder, U. S. C. C. of App., Eighth Circuit*, 160 Fed. Rep. 627.

32.—*Subscription to Stock.*—Stockholders who were induced to buy stock of a corporation by fraud held not entitled to rescind their contracts and prove as creditors of the corporation in bankruptcy where they had been stockholders and received dividends for some years during which the corporation had contracted indebtedness.—*Scott v. Abbott, U. S. C. C. of App., Eighth Circuit*, 160 Fed. Rep. 573.

33.—*Corporations—Domination by Other Corporation.*—Domination of one corporation by another through the ownership of a majority of stock held not ground for equitable relief, so long as such domination is not exercised unlawfully or illegally.—*Theis v. Spokane Falls Gaslight Co., Wash.*, 95 Pac. Rep. 1074.

34.—*Formal Subscription to Stock.*—Where stock of a corporation is allotted to and received by a stockholder, it is no defense to his liability to pay therefor in full that the stock was issued as fully paid, or that he had not made a formal subscription therefor.—*In re Duryea Power Co., U. S. D. C., E. D. Pa.*, 159 Fed. Rep. 783.

35.—*Liability as Surety.*—A corporation not organized to execute contracts of suretyship may be liable as a surety.—*Forty-Acre Spring Live Stock Co. v. West Texas Bank & Trust Co., Tex.*, 111 S. W. Rep. 417.

36.—*Sale of Stock.*—Defendant's agreement with plaintiff, on selling him stock for \$1,000, to repurchase it at the end of three years for \$1,720, constituted an option to plaintiff.—*Ralche v. Morrison, Mont.*, 95 Pac. Rep. 1061.

37.—*Costs—On Appeal.*—A successful litigant who appealed and the sureties on his appeal

bond held not liable for the costs in the district court adjudged against his adversary, though the judgment was affirmed.—*Lodick Co. v. Jones, Tex.*, 110 S. W. Rep. 920.

38.—*Contracts—Jurisdiction.*—Though the parties are in court, a Mississippi court has no jurisdiction of a suit involving title to land in another state, where there is no question of specific performance, enforcement of trust, or the doing of any act binding on the conscience of a party.—*Sutton v. Archer, Miss.*, 46 So. Rep. 705.

39.—*Customs and Usages—Unambiguous Contracts.*—Where a contract in plain and unequivocal terms called for 50,000 shingles 5 by 16—that is, 5 inches wide and 16 inches long—evidence that by custom among shingle mill men a shingle of that size counted as a shingle and a fourth is inadmissible.—*Birmingham & A. R. Co. v. Maddox & Adams, Ala.*, 46 So. Rep. 780.

40.—*Damages—Imaginary Suffering.*—One causing personal injury is liable for suffering due to the injured person's imagination caused by the neurotic condition produced by the shock.—*Chicago, R. I. & G. Ry Co. v. Barnes, Tex.*, 111 S. W. Rep. 447.

41.—*Deeds—Estate Conveyed.*—Where land was conveyed by a husband and wife to their son in consideration of support, to revert to them if the son died before their death, on the son's surviving his father, there was no possibility of a reversion in the heirs of the father.—*Whittaker v. Trammell, Ark.*, 110 S. W. Rep. 1041.

42.—*Depositaries—Husband and Wife.*—Where husband and wife deposit money to be paid to wife on her obtaining a divorce, it may be recovered from the depositary, the transaction being against public policy.—*Levine v. Klein*, 111 N. Y. Supp. 174.

43.—*District and Prosecuting Attorney—Powers and Duties.*—While neither the courts nor the commonwealth or county attorneys should turn over the prosecution of criminals to those who are under no responsibility to the state, employed counsel may assist in prosecutions.—*Adams v. Commonwealth, Ky.*, 111 S. W. Rep. 348.

44.—*Divorce—Alimony.*—The amounts awarded by a decree of divorce for the wife's alimony and the children's maintenance should be separated into distinct items, and not included in one sum.—*Connett v. Connett, Neb.*, 116 N. W. Rep. 658.

45.—*Custody and Maintenance of Children.*—Where the custody and maintenance of children is provided for by contract between husband and wife when parties to a suit for divorce, it is within the power of the court, under Code sec. 3180, to set aside the contract and to make such provision in lieu thereof as the interests of the children demand.—*Slattery v. Slattery, Iowa*, 116 N. W. Rep. 608.

46.—*Suit Money.*—While the Supreme Court has power to award suit money, attorney's fees, and alimony pendente lite in such court, its jurisdiction in such matters should be exercised with much care and discretion, and an award made only where the demands of justice make it clearly essential.—*Holcomb v. Holcomb, Wash.*, 95 Pac. Rep. 1091.

47.—*Eminent Domain—Bridges Over Navigable Streams.*—Where a stream, though not naturally navigable when a bridge was built, has been made so by locks and dams, the bridge

may be required to be changed so as not to unreasonably obstruct navigation without compensation.—*United States v. Monongahela Bridge Co.*, U. S. D. C., W. D. Pa., 160 Fed. Rep. 712.

48. **Escheat—Deposits in Court.**—Money deposited in a federal court, if subject to escheat belongs to the state, and not to the federal government as *parens patriae*.—*American Loan & Trust Co. v. Grand Rivers Co.*, U. S. C. C., W. D. Ky., 169 Fed. Rep. 775.

49. **Evidence—Interrogatories.**—A party who, before announcing ready for trial, failed to call attention to his motion to have interrogatories propounded to the adverse party taken as confessed because of his refusal to answer, did not waive his statutory right to have the interrogatories confessed.—*Lyon v. Files*, Tex., 110 S. W. Rep. 999.

50. **Execution — Mortgaged Personalty.** — Where several articles of personalty subject to the same mortgage are seized on execution against the mortgagor, who persists that they be sold separately, such action supports a finding that he consented to a sale free from the mortgage and the payment of the same from the proceeds.—*Knutson v. Rosenberger*, Neb., 116 N. W. Rep. 687.

51. **Forgery—What Constitutes.**—Where the name of the payee of a check was fictitious, an indorsement thereof by the person cashing the check constituted a forgery.—*Harmon v. Old Detroit Nat. Bank*, Mich., 116 N. W. Rep. 617.

52. **Fraud—False Representation.**—In an action for fraud and deceit inducing a purchase of property, it is not a defense that plaintiff make other investigation and inquiry respecting the property, if the fraudulent conduct of defendant was a material, although not the sole inducement to the purchase.—*Tooker v. Alston*, U. S. C. C. of App., Eighth Circuit, 159 Fed. Rep. 599.

53.—**Presumptions.**—A jury must rely on presumptions drawn from established facts to show fraud in transactions occurring 45 years ago, provable only by a few acts of commission and omissions; the principal participants being dead.—*Mead v. Darling*, U. S. C. C. of App., Second Circuit, 159 Fed. Rep. 684.

54. **Frauds, Statute of—Sale Under Foreclosure.**—That there was no memorandum of a sale under a power in the mortgage held not to give the mortgagor the right to avoid the sale under the statute of frauds.—*Drake v. Rhodes*, Ala., 46 So. Rep. 769.

55. **Gaming — Gambling Devices.** — Devices when designed solely for gambling purposes may be destroyed under the statutes authorizing the destruction of gambling devices.—*State v. Sanders*, Ark., 111 S. W. Rep. 454.

56. **Gifts—Possession.**—Though mere possession, use and enjoyment of land for more than five years would not establish title thereto, they might do so in connection with a parol gift.—*Altgelt v. Escalero*, Tex., 110 S. W. Rep. 989.

57. **Highways—Negligence.**—Injury to one and his automobile caused in attempting to pass defendant's trucks held due to his own negligence, and not to that of the drivers of the trucks.—*Lorenz v. Tisdale*, 111 N. Y. Supp. 173.

58. **Homestead—Rights of Creditors.**—Where a debtor is entitled to a homestead, his creditors cannot have the land sold during the life-time of the debtor subject to his homestead right,

though after his death sale may be ordered reserving the right of his widow and children.—*Louisville Fertilizer Co. v. Lorton*, Ky., 110 S. W. Rep. 870.

59. **Husband and Wife—Estate in Entirety.**—A deed to a husband and wife vests an estate in entirety in them, and the husband surviving becomes the sole owner of the land.—*Johnson v. Austin*, Ark., 111 S. W. Rep. 455.

60. **Innkeepers—Licenses.**—Under city ordinances, a hotel conducted on the "European" plan held not subject to a license tax for conducting both a hotel and restaurant.—*New Galt House Co. v. City of Louisville*, Ky., 111 S. W. Rep. 351.

61. **Intoxicating Liquors—Application for License.**—An application for a liquor license will not be rejected because the officer with whom it was filed removed from the city, making it inconvenient or impossible for the public to see the application.—*In re Phelps*, Neb., 116 N. W. Rep. 681.

62. **Judges—Acts Off the Bench.**—The county court must speak by its records, and the county judge, when off the bench, has no authority to bind the county court, and anything that the county judge may have said as an individual cannot militate against the judgment of the county court.—*Renshaw v. Cook*, Ky., 111 S. W. Rep. 377.

63. **Judgment—Res Judicata.**—A prior adverse decree in a state court in a suit between the same parties to set aside the allowance of certain claims against a decedent's estate for fraud held *res judicata* in a suit in the federal court to set aside the allowance of such claims on the same allegations of fraud.—*Jackson v. Wilkerson*, U. S. C. C. of App., Eighth Circuit, 160 Fed. Rep. 623.

64. **Judicial Sales—Conformation of Sale.**—Where a circuit court, being one of continuous session, confirms a sale under a decree, the order of confirmation becomes final in 60 days thereafter, after which time exceptions to the report of sale cannot be allowed.—*Sinder v. Conrad*, Ky., 111 S. W. Rep. 287.

65.—**Rights of Buyer.**—The highest bidder at a judicial sale, to whom the property has been struck off acquires vested rights which must be respected by the court.—*Robertson v. McClintock*, Ark., 110 S. W. Rep. 1052.

66. **Landlord and Tenant—Failure to Repair Premises.**—Where failure of a landlord to make agreed repairs amounts to a constructive eviction, the tenant can abandon the premises, and his liability for rent will terminate.—*Rea v. Algren*, Minn., 116 N. W. Rep. 580.

67. **Life Insurance—Acceptance After Maturity.**—The acceptance by an insurance company of payment of a premium or premium note after maturity is in general a waiver of a forfeiture of the policy caused by the prior default.—*Duncan v. Missouri State Life Ins. Co.*, U. S. C. C. of App., 160 Fed. Rep. 646.

68.—**Notice of Premiums.**—Failure of insurer to notify plaintiff of the amount of a premium due on a special date held not to relieve him of the duty of paying an amount on that date equal to the last preceding premium.—*Kray v. Mutual Reserve Life Ins. Co.*, Tex., 111 S. W. Rep. 421.

69. **Logs and Logging—Ownership of Sunken Logs.**—That sunken logs were unmarked, or that distinguishing marks thereon had become obliterated, did not deprive the owners of the right to contract for the recovery and disposition thereof.—*Whitman v. Muskegon Log Lifting & Operating Co.*, Mich., 116 N. W. Rep. 614.

70. **Master and Servant—Acts of Superintendent.**—Failure of a superintendent to have a red flag placed as a warning that workmen were obstructing the track was negligent omission to perform an act of superintendence.—*Campbell v. Long Island R. Co.*, 111 N. Y. Supp. 120.

71. **Assumed Risk.**—An employee does not assume the risk of injury from compliance with the orders of the master, unless the danger is so obvious that an ordinarily prudent person would not undertake the work.—*Illinois Cent. R. Co. v. Edmondson*, Ky., 111 S. W. Rep. 331.

72. **Defective Appliances.**—The test of the discharge by a master of his duty is ordinary care to supply such places and appliances as persons of ordinary intelligence commonly furnish in like circumstances.—*H. D. Williams Cooperage Co. v. Headrick*, U. S. C. of App., Eighth Circuit, 159 Fed. Rep. 680.

73. **Employment of Incompetent Servant.**—The fact that other servants are competent will not excuse a master in employing incompetent person to perform a particular work, though in conjunction with such competent fellow servants.—*Wilkinson v. Kanawha & Hocking Coal & Coke Co.*, W. Va., 61 S. E. Rep. 875.

74. **Failure to Pay Employee.**—Failure by an employer to pay his employee held not tantamount to a discharge, so as to entitle the employee who left his employment because of such failure to maintain an action as for a wrongful discharge.—*Barnett v. Cohen*, 110 N. Y. Supp. 835.

75. **Injury to Servant.**—A car repairer held entitled to rely on observance of a rule forbidding a flying switch, and not required to look and listen for cars, cut loose from an engine in a flying switch, on the track he was about to cross.—*Galveston, H. & S. A. Ry. Co. v. Conuteason*, Tex., 111 S. W. Rep. 187.

76. **Safe Place to Work.**—A bridge used as a part of the scenery in a play was not a "place" within the rule which requires the master to furnish his employees with a safe place to work, but was rather an appliance, such as scaffolding used in the conduct of the work has been held to be.—*Hahn v. Conried Metropolitan Opera Co.*, 111 N. Y. Supp. 161.

77. **Municipal Corporations—Defacto Corporation.**—The state alone can take advantage of the fact that a municipality has been illegally constituted by instituting a proceeding to test the validity of the charter thereof, and no collateral attack can be permitted.—*City of Carthage v. Burton*, Tex., 111 S. W. Rep. 440.

78. **Defective Sidewalk.**—A city is chargeable with notice that a wooden sewer will become unsafe by decay of the wood, and if a pedestrian is injured by the caving in of the sewer owing to such decay the city is liable.—*City Council of Montgomery v. Comer*, Ala., 46 So. Rep. 761.

79. **Public Improvements.**—A contractor who had made a mistake in his bid for a public

improvement, to the knowledge of the board of local improvements, and had promptly notified them of the fact, held entitled to be relieved from the bid.—*R. O. Bromagin & Co. v. City of Bloomington*, Ill., 84 N. E. Rep. 700.

80. **Navigable Waters—Riparian Rights.**—The use of a stream to recover sunken saw logs without injury to the banks or unlawful trespass thereon is not an interference with the rights or enjoyment of the riparian proprietor.—*Whitman v. Muskegon Log Lifting & Operating Co.*, Mich., 116 N. W. Rep. 614.

81. **Negligence—Imputed Negligence.**—Where cotton was delivered to a compress company for compression for hire, and was destroyed by fire from a railroad locomotive, the negligence of the compress company or its servants was not imputable to the owner of the cotton.—*Sea Ins. Co. of Liverpool, England v. Vicksburg, S. & P. Ry. Co.*, U. S. C. C. of App., Fifth Circuit, 159 Fed. Rep. 676.

82. **Presumption and Burden of Proof.**—It is only where plaintiff's allegations or evidence show prima facie negligence on his part that it devolves on him to show facts from which, on the whole case, he may be found free therefrom.—*Galveston, H. & S. A. Ry. Co. v. Counteson*, Tex., 111 S. W. Rep. 187.

83. **Res Ipsa Loquitur.**—Prima facie case of negligence held shown, under the rule of res ipsa loquitur, where a basket from an overhead carrier system falls on a customer in a store.—*Anderson v. McCarthy Dry Goods Co.* Wash., 96 Pac. Rep. 325.

84. **Partnership—Mutual Rights.**—Where a partnership agreement provides that one partner shall have exclusive management, and he in fact exercises such control, he must account as a trustee for all partnership property; but where, notwithstanding such provision, the other members actually participate in the management, such partner is personally responsible only for the results of his fraudulent conduct or other breach of duty.—*McAlpine v. Millen*, Minn., 115 N. W. Rep. 583.

85. **Transactions Between Partners.**—A contract for the purchase of a two-thirds interest in a mining lease, with a view to a subsequent partnership between the parties, held not a partnership transaction, to be settled upon an accounting in equity.—*Crocker v. Barteau*, Mo., 110 S. W. Rep. 1062.

86. **Principal and Surety—Liability of Surety.**—The relation between the creditor and the security debtor is comprised within the strict letter of the contract, and the obligation of the latter should not be extended by any liberal intendment beyond the undertaking.—*State v. Pitman*, Mo., 111 S. W. Rep. 134.

87. **Process—Service.**—Service of a warrant of arrest at the instance of the receiver of a corporation on petitioner, who, without the receiver's knowledge or consent, had been fraudulently induced to come within the state by the directors of the corporation, held not procured by the fraud of the receiver.—*Ex parte Taylor*, R. I., 69 Atl. Rep. 553.

88. **Service on Non-Residents.**—Defects in proceedings taken to obtain jurisdiction of non-residents, of a nature tending to mislead and prejudice defendants, are fatal to the juris-

diction.—*D'Autremont v. Anderson Iron Co.*, Minn., 116 N. W. Rep. 357.

89. **Public Lands**—Cancellation of Patent.—The government may impose such conditions upon alienation of public lands as to it seems best, and when through fraudulent representations or practices a patent has been wrongfully secured, equity, as long as the title remains in the patentee at least, affords ample redress.—*United States v. Collett*, U. S. C. C. of App., Eighth Circuit, 159 Fed. Rep. 932.

90. **Quietling Title**—Unlawful Entry Into Possession.—Possession obtained by unlawful and forcible entry held not to sustain a bill to remove cloud and quiet and confirm title, but to be available to defeat such a bill by the ousted party, where he has an adequate remedy at law.—*Delaney v. O'Donnell*, Ill., 84 N. E. Rep. 668.

91. **Railroads**—Attracting Children to Tracks.—A railroad company whose lines pass through cities is not required to maintain a lookout for children who are in the habit of jumping on and off the cars while in motion.—*Swartwood's Guardian v. Louisville & Nashville R. Co.*, Ky., 111 S. W. Rep. 305.

92.—**Defective Crossing**—Driver of a wagon killed by reason of a defect in a railroad crossing held not negligent as a matter of law in attempting to turn on the crossing and in failing to approach it at right angles.—*Sample v. Chicago, B. & Q. R. Co.*, Ill., 84 N. E. Rep. 643.

93.—**State Regulation**—A state has power to create a board of railroad commissioners and prescribe their powers and regulate or forbid the consolidation of railroad corporations and provide that parallel lines shall so remain.—*Mobile J. & K. C. R. Co. v. State of Mississippi*, U. S. S. C., 28 Sup. Ct. Rep. 650.

94.—**Vibration and Noise as a Nuisance**—Vibration and noises, caused by a railroad using city streets lawfully for making up trains, switching, etc., do not constitute such a nuisance as can be prohibited by injunction.—*Galveston, H. & S. A. Ry. Co. v. DeGroat*, Tex., 110 S. W. Rep. 1006.

95.—**Wrongful Ejection**—A passenger wrongfully ejected from a train held entitled to the value of her ticket as part of the damages recoverable.—*St. Louis & S. F. R. Co. v. McAnella*, Tex., 110 S. W. Rep. 936.

96. **Rape**—Assault With Intent to Rape.—To warrant a conviction for assault with intent to rape, it must be shown that it was the intention of the person making the assault to accomplish his purpose and to overcome any resistance offered by the person assaulted.—*State v. Espenschied*, Mo., 110 S. W. Rep. 1072.

97. **Receivers**—Liens.—Corporate bondholders held not concluded by an order authorizing a receiver of the corporation to issue a receiver's certificate for indebtedness, which should constitute a first lien on the corporation's property.—*Bernard v. Union Trust Co.*, U. S. C. C. of App., Fourth Circuit, 159 Fed. Rep. 620.

98. **Remainders**—Time to Sue.—The remainderman's estate in a homestead will not support ejectment during the lifetime of the life tenant, and limitations will not commence to run against that possessory action until the demise of the surviving spouse.—*Hobson v. Huxtabule*, Neb., 116 N. W. Rep. 778.

99. **Sales**—Implied Warranty.—Where goods are sold for a particular purpose, there is an

implied condition that the goods are fit for such purpose.—*West End Mfg. Co. v. P. R. Warren Co.*, Mass., 84 N. E. Rep. 488.

100.—**Implied Warranty As to Fitness**—Where the buyer has an opportunity to inspect the commodity, and the seller is guilty of no fraud, and is neither the manufacturer nor the grower of the article, there is no implied warranty.—*W. R. Colchord Machinery Co. v. Loy-Wilson Foundry & Machinery Co.*, Mo., 110 S. W. Rep. 630.

101.—**Rescission**—Where a seller consents to the rescission of the contract of sale, the law raises an implied agreement on his part to refund the price paid.—*Greeder v. Stahl*, S. D., 115 N. W. Rep. 1129.

102.—**Transfer of Title**—Where goods are ordered to be shipped C. O. D., the sale is complete when the goods are delivered to the carrier, in the absence of a contract to the contrary.—*State v. Rosenberger*, Mo., 111 S. W. Rep. 509.

103.—**Warranty of Fitness**—That the sellers of a barge agreed to construct four coal bins in it to be loaded and unloaded separately implies a warranty of fitness.—*Excelsior Coal Co. v. Gildersleeve*, U. S. C. C. of App., Second Circuit, 160 Fed. Rep. 47.

104. **Schools and School Districts**—Government Discipline of Pupils.—The discretion of school authorities in government and discipline of pupils is very broad, and the courts will not interfere with the exercise of such authority, except when illegally or unreasonably exercised.—*State v. District Board of School Dist. No. 1*, Wis., 116 N. W. Rep. 232.

105. **Seduction**—Exemplary.—In no action for seduction, exemplary damages are recoverable when plaintiff is so connected with the female seduced as to be capable of receiving injury from her dishonor, regardless of the existence or non-existence of the malice of defendant.—*Anderson v. Aupperle*, Or., 95 Pac. Rep. 330.

106. **Shipping**—Demurrage.—A consignee of cargo cannot be held liable for demurrage because of delay in discharging due to the inability of the vessel to reach the dock designated for discharge owing to obstruction by dredges engaged in improving the waterway in the absence of a contract covering such situation.—*Roney v. Chase, Talbot & Co.*, U. S. D. C., 160 Fed. Rep. 268.

107.—**Failure to Surrender Freight**—Failure to surrender pending freight to trustee does not necessitate refusal to allow limitation of liability for claims from collision at sea, where there is an honest controversy as to whether there was any such freight to be surrendered.—*Deslions v. L. Compagnie Generale Transatlantique*, U. S. S. C., 28 Sup. Ct. Rep. 664.

108. **Specific Performance**—Oral Agreements.—Where a man and wife agree to treat a young girl becoming a member of their family as their own and leave her all their property, and there is a full performance of the agreement by the girl, it will be enforced.—*Bichel v. Oliver*, Kan., 95 Pac. Rep. 396.

109.—**Right to Relief**—Specific performance will not be decreed in case of fraud, mistake, or of hard and unconscionable bargains, or where it would be inequitable under all the circumstances.—*Alple-Hemmelmahn Real Estate Co. v. Speibrink*, Mo., 111 S. W. Rep. 480.

110. **States—Public Printing.**—A contractor for public printing making under the direction of the superintendent of public instruction books of a smaller size and containing an inferior grade of paper to that called for by the contract held not entitled to recover the full contract price for the work.—*Commonwealth v. Bacon*, Ky., 111 S. W. Rep. 387.

111. **Street Railroads—Contributory Negligence.**—Where, in view of the emergency, it cannot be said as a matter of law that a prudent man would have backed up or gone ahead in front of a street car, it is for the jury whether in what the driver did there was any want of ordinary care.—*Adam v. Union Electric Co.*, Iowa, 116 N. W. Rep. 332.

112. **Injury to Alighting Passenger.**—It is negligence for a conductor to cause a moving car to be suddenly started forward with such force as to throw a passenger, who is attempting to alight, to the ground.—*Peck v. Springfield Traction Co.*, Mo., 110 S. W. Rep. 659.

113. **Injury to Person on Track.**—That when a pedestrian left the curb, he thought he had time to cross ahead of a car, did not relieve him of the obligation to again look.—*Glynn v. New York City Ry. Co.*, 110 N. Y. Supp. 836.

114. **Telegraphs and Telephones—Damages for Mental Suffering.**—Damages for mental anguish due to failure to deliver a telegram held not recoverable unless the telegraph company knew of the telegram's importance or was by its language put on inquiry.—*Western Union Telegraph Co. v. Olivarria*, Tex., 110 S. W. Rep. 930.

115. **Telephone Franchise.**—A telephone franchise held not to entitle subscribers to long-distance service without charge in addition to fixed monthly rates, but to merely give them the privilege of using long-distance connections from their phones.—*Cumberland Telephone & Telegraph Co. v. City of Hickman*, Ky., 111 S. W. Rep. 311.

116. **Theaters and Shows—Liability for Injury to Patron.**—An athletic association's contract with a spectator, who paid for admission and was injured by collapse of a stand built by it, held to be that, except for unknown defects, not discoverable by reasonable means, the stand was safe.—*Scott v. University of Michigan Athletic Association*, Mich., 116 N. W. Rep. 624.

117. **Trade Marks and Trade Names—Period of User.**—The right to a trade mark does not depend upon any particular period of user, but once it is adopted in good faith and used, the right thereto inures, and will prevail against any subsequent user.—*Walter Baker & Co. v. Delapenha*, U. S. C. C., D. N. J., 160 Fed. Rep. 746.

118. **Trade Unions—By-Laws.**—By-laws of a trade society, providing for payment of wages to discharged members during period of non-employment, construed.—*Donavan v. Friendly Soc. of Engravers*, R. I., 69 Atl. Rep. 554.

119. **Trespass to Try Title—Right of Action.**—In trespass to try title, plaintiff being the owner of an undivided interest in the land sued for, as against a defendant who is a trespasser without any title thereto, may recover the whole tract sued for, although he has not acquired the other interests.—*Jett v. Hunter*, Tex., 111 S. W. Rep. 176.

120. **Trial—Direction of Verdict.**—Where each party requests the judge to direct a verdict,

such procedure is tantamount to a request that the trial judge find the facts, which finding will be upheld if there is any evidence to support it.—*Mead v. Darling*, U. S. C. C. of App., Second Circuit, 159 Fed. Rep. 604.

121. **Ignoring Evidence.**—In an action for injuries to an employee an instruction that the employer was not required to inspect simple tools held properly refused, in view of the evidence.—*Baltimore & O. S. W. R. Co. v. Walker*, Ind., 84 N. E. Rep. 730.

122. **Trusts—Constructive Trusts.**—In an action to establish a constructive trust, proof that the promise was the cause of the failure to make the necessary legal provision to effectuate the desire of the promisee held essential.—*Mead v. Robertson*, Mo., 110 S. W. Rep. 1095.

123. **Express Trusts.**—Defendant, who, with his sister, had built a house upon the lot of their mother under an oral agreement, held an express trustee for his sister as to her interest therein, with the sole equitable title to the property vested in him.—*Westport Lumber Co. v. Harris*, Mo., 110 S. W. Rep. 609.

124. **Vendor and Purchaser—Bona fide Purchaser.**—An innocent purchaser for value takes the title discharged of secret outstanding equities not on record, and such a purchaser may transfer the title to one having notice, and a good title will descend to such purchaser's heirs.—*Hendricks v. Calloway*, Mo., 111 S. W. Rep. 60.

125. **Waters and Water Courses—Right to Use of Water.**—Mere nonuser of water or lapse of time held insufficient to establish abandonment, which is in all cases a question of intention.—*Edgemont Imp. Co. v. N. S. Tubbs Sheep Co.*, S. D., 115 N. W. Rep. 1130.

126. **Witnesses—Credibility.**—That defendant's witnesses whose reputation was attacked lived in a distant state, and defendant was not notified before the trial that their credibility would be attacked, did not make the impeaching testimony inadmissible.—*St. Louis Southwestern R. Co. of Texas v. Garber*, Tex., 111 S. W. Rep. 227.

127. **Cross-Examination.**—In a prosecution for rape, the refusal to permit prosecutrix to be asked on cross-examination whether or not she was not diseased on the date defendant was charged with having raped her held error.—*People v. Lean*, Cal., 95 Pac. Rep. 380.

128. **Demonstrative Evidence.**—Compelling accused to put his foot in a track for the purpose of identifying him held not objectionable as compelling him to be a witness against himself, or to give evidence against himself, in violation of Const. U. S. Amend. 5, and Const. Miss. 1890, Sec. 26.—*Magee v. State*, Miss., 46 So. Rep. 529.

129. **Immunity.**—One having the right to claim the privilege under the constitution providing that no person shall be compelled in any criminal case to be a witness against himself, who fails to claim the privilege, waives it.—*People v. Cahill*, 110 N. Y. Supp. 728.

130. **Right to Contradict Party's Own Witness.**—A party cannot claim surprise at the testimony of a witness called by him, where the witness told counsel before being placed on the stand what the effect of his testimony would be.—*Texas & P. Ry. Co. v. Crump*, Tex., 110 S. W. Rep. 1013.

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WHAT SHALL BE DONE WITH THE MOB?
By J. J. McSwain.

Editorial reference has already been recently made to this question, by Duane Mowry (67 Cent. L. J. 315). This terrible anarchy, however, cannot be too strongly nor too frequently condemned.

It seems to be universally agreed that the present delay in the administration of justice, and the present uncertainty of conviction of criminals, are the two prime reasons which excuses in the mind of ordinary citizens for participation in such lawless violence. We might illustrate this by citing just what takes place at the formation of every mob. An outrageous crime, or the attempt at crime, has been committed; a group of men are indignantly condemning the crime, and the criminal. The consciences of these indignant men seem to declare that this criminal must be punished, and as his punishment by the court is too uncertain, they at once conclude that they would be justified in administering the punishment themselves. Having arrived at this psychic stage, it is an easy matter for every man to follow when the leader says, "Let us go, and administer God's justice."

But if it is right for an unorganized mob, without trial, to inflict punishment for any one offense, it is right for a mob to punish for all offenses. Certain it is that every offense of every degree against the right of another person should be punished, and if the justification for punishment by a mob is the uncertainty of punishment by legal procedure, this argument applies to every grade and kind of crime, and we should tear down our court-houses, abolish judge-ships, and upon the commission of a crime, raise the "hue and cry," and pursue in hot haste the supposed criminal, and adminis-

ter certain punishment before we let our indignation cool. This example reduces the argument to an absurdity, and shows that unless the law is adequate for every offense, however grave, we still have but anarchy.

There is but one perfect remedy for the two alleged causes for taking a case out of the hands of the court; this remedy is a quickened and enlightened public conscience which will affect and influence all the officials of the court, and especially the citizens who sit in the jury box. But you ask what can we do to bring about this desirable change of public opinion. Is not the process necessarily so slow as to permit the disease to destroy the body before the remedy becomes effective?

Of course there are many ways of educating the thought of the people along this line; such as the press, the pulpit, and the school. However, there is one means that may have a more immediate result, to-wit: To enact a law requiring every person who is about to be sworn into office to take an oath that he has not for the last ten years prior to the date of the oath, engaged in any effort to lynch any person, or to prevent the usual and ordinary process of law. Further, that he will not, during the term of office, into which he is about to be inducted, engage in any effort to obstruct or prevent the usual course of justice. The restraining influence of this thought will be better understood when we realize that practically every man who has the leadership necessary to incite a mob, entertains an ambition down in his breast to hold public office at some time. Knowing that participation would disqualify him from holding office, and knowing that his political opponents would find out the fact and expose it, when the usual officers of the law could not, such leaders will be very careful in their connection with mobs. Hence, this law should and would bear immediate fruit.

One thing is sure; unless the present tendency is checked, the life of no man is safe. Even the best and purest citizens, such as ministers of the gospel, often times incur the bitter hatred of the base criminal class,

who may any night work themselves up to the point of lynching the object of their hatred. Every lynching, or attempt at lynching, is treason to the law, and as ours is a government, not of men, but of law, every lynching is treason to the government. The government cannot stand in the face of such treasonable assaults; our republican institutions become weaker every time they are thus assailed. Hence, those who love their country and her institutions, must be willing, not only to write and speak against this worst form of lawlessness, but they must be willing to throw themselves into the breach, and meet force with force, and make sure the triumph of lawful authority.

NOTES OF IMPORTANT DECISIONS

ADULTERY—IS COHABITATION BETWEEN A MARRIED MAN AND A SINGLE WOMAN ADULTERY?—Although by every accepted standard of morals, the husband as well as the wife may be a principal to the commission of the act of adultery with a single person, this was not the wholly accepted doctrine at common law where adultery consisted of carnal intercourse with a married woman and, therefore, the incontinency of a husband was dignified by no higher or more serious criminal appellation than fornication. This rule is stated and approved by both our principal Encyclopedias. 1 Am. and Eng. Ency. 747; 1 Cyc. 953.

But the recent case of *Bashford v. Wells* (Kans.), 96 Pac. 663, takes a different view. That case was an action for slander in charging carnal intercourse by a married man with a single woman. The defense was that this did not charge the crime of adultery, and therefore was not actionable without proof of special damage. After a laborious examination of the authorities the court holds the term to be applicable to both husband and wife, and refuses to set up unequal standards of morality. After calling attention to the conflict of authority on the question of the judicial definition of the crime of adultery, and after showing that the restricted sense in which it was used at common law, as applicable only to prevent the imposition of spurious offspring upon the husband, was not the full meaning attributed to that term, even at

common law, the court goes on to say: "Whatever the word may have meant in the original enactment, we think it was employed in the amendment in its usual and ordinary significance, which we conceive to be an act of illicit sexual intercourse committed by a married person—its essential criminality consisting of the violation of the marriage vow. In the edition of Webster's Dictionary published in 1854, this definition was given: 'Violation of the marriage bed; a crime, or a civil injury, which introduces or may introduce, into a family, a spurious offspring. In common usage, adultery means the unfaithfulness of any married person to the marriage bed.' While this recognizes the etymological meaning, it points to the other as that more generally accepted. The statement that at the common law the term 'adultery' was confined to illicit sexual intercourse to which a married woman is a party is at least inaccurate. The word in English law has always been applicable to such an act where either participant is married. In Blount's Law Dictionary (1717) it is said: 'Adultery is properly spoken of married persons; but if only one of the two by which this sin is committed, be married, it makes adultery, which was severely punished by the ancient laws of this land.' This is repeated in substance in the law dictionaries of Crowell (1723) and Cunningham (1783). But as adultery was not a crime cognizable by the temporal courts the common law had to do with it only as affording a right of private action to the injured husband. The common-law courts gave no remedy of any character for the incontinence of a husband where his paramour was unmarried, not because his act was not adultery, but because it was not the kind of adultery of which they had jurisdiction; they afforded no punishment for unfaithfulness to the marriage bed by either spouse, not because it was not in each case adultery, but because adultery was not a crime."

WEAPONS—RIGHT TO USE GUN IN THREATENING MANNER TO RESIST A TRESPASS.—Some trial judges are not clear in their understanding of the constitutional right of the citizen to bear arms and to use them on proper occasions. This is evidenced by the action of the trial court in the case of *State v. Lipp* (Mo.), 110 S. W. 4, in holding a defendant liable for assault in advancing upon trespassers with a loaded gun. The appellate court in reversing the judgment held that though one may resist a trespass on his property, he cannot be allowed to kill the trespasser. "But," says the court, "if defendant

went to meet the trespassers to forbid them going through his premises and turn them back, it was a rightful purpose; and if he took his gun along only to resist attack in case an attack should be made upon him for thus asserting his lawful right, and if he made no demonstrations with the gun except in resistance to the approach of the trespassers upon him for the purpose of assault, he did not commit an offense."

WILLS—PRESUMPTION OF UNDUE INFLUENCE FROM PROFESSIONAL RELATIONSHIP OF TESTATOR AND LEGATEE.—It is a sad commentary on human nature that courts are compelled to indulge presumptions similar to that which controlled largely the judgment of the court in the case of *Hitt v. Terry* (Miss.) 46 South. 830, where the court held that when a will is made by a patient in favor of his physician, to the exclusion of relatives to whom ordinarily his property would go, with no reason appearing why such exclusion should occur, it is presumed, on grounds of public policy, that the will is void.

In upholding instructions which stated or relied upon this presumption the court said: "The principle announced in respect to this matter by the instructions for the contestants was, in substance, that the law presumes that, where a will or deed is made by a patient to his physician, to the exclusion of those to whom, ordinarily, his property would go, no reason existing why such exclusion of relations should occur, the law raises the *prima facie* presumption that the will is void on grounds of public policy; in other words, that in those conditions in life in which confidential relations exist between parties, such as attorney and client, physician and patient, etc., the law presumes deeds or wills made by the client to the attorney, or the patient to the physician, to be *prima facie* void, and therefore requires such beneficiary under the will to show the absence of undue influence and the like, and this doctrine, in its application both to wills and deeds, is laid down in the most positive and emphatic fashion in *Meek and Thornton, Ex'rs, v. Perry and Wife*, 36 Miss. 190. Counsel confesses this, but contends that it was decided 49 years ago by a divided court, and has never been reaffirmed in this state. On this proposition we have merely to say that we do not feel warranted in overruling this decision, if we doubted the soundness of the conclusion, by which we do not mean to say that we do doubt the soundness of the conclusion; indeed, we think it is correct."

The dissenting opinion in the case of *Meek v. Perry*, *supra*, was written by Justice Handy, who agreed entirely with the general rule an-

nounced by the majority of the court, and from which counsel for defendant dissent, but rested his dissent exclusively on the ground that the rule should only be applied in those cases in which there had been prior dealings between the beneficiary and the devisor, or the grantor and the grantee. At page 266 Judge Handy says: "But when we attempt to apply the rule to cases where the parties have not dealt together, where no transaction has taken place between them, or where the beneficiary has not been active in procuring the act which conferred the benefit, it appears to be evident that the force of the rule fails. It cannot apply, because, not being a party to the transaction which conferred the benefit, it cannot with reason be expected that with any precaution he could be prepared to explain the circumstances attending it. He cannot be required to explain a matter in which he had no participation, and which may have been done wholly without his knowledge. To apply the rule to such a case would be almost inevitably to condemn the act absolutely, and that upon the unjust reason that he acted unfairly in a matter to which he was not a party."

GENERAL AND SPECIAL AGENTS. —IS THERE ANY DISTINCTION AS TO LIABILITY?

Possibly no distinction ever made in any branch of the law has been so productive of confusion as that between general and special agents. Not only have the courts disagreed as to the liability of principals for the acts of the respective agents, but even the meaning of the terms general and special is unsettled. Thus we find Mr. Mechem defining a general agent as one "who is empowered to transact all the business of his principal of a particular kind or in a particular place," and a special agent as "authorized to act only in a specific transaction,"¹ thus making the distinction rest upon the extent of the business transacted by the agent.

On the other hand, Mr. Holland informs us that "Agents are said to be general when their authority is defined by their character or business, as in the case of factors, brokers or partners, or special when their authority is limited by the terms of their appointment."² The test here made is the

(1) Agency, sec. 6.

(2) Jurisprudence, 8th ed. p. 242.

nature of the authority given. A third writer combines the features of the two preceding definitions.³ The distinction generally adopted is that of Mr. Mechem.⁴

The powers of general and special agents have been distinguished almost from the beginning of the law of agency.⁵ The terms are, however, a comparatively recent creation. Blackstone does not mention them nor do the earliest American cases. In an early Virginia case decided in 1794, the court makes a distinction between agents clothed with general and special powers, but the distinction is that which we make to-day between general and universal agents.⁶ In another early case the rule was stated to be that "to charge the principal the agency must be universal, or the power must be explicitly given. For if the power is limited to a particular object, it is a mere relation between merchant and factor, and the latter must act within the pale of his authority or the principal is not bound."⁷

One of the most widely cited of the early cases is *Munn v. Commission Co.*⁸ The court there stated that "The distinction is well settled between a general and a special agent. As to the former the principal is liable for the acts of the agent, when acting within the general scope of his authority, and the public cannot be supposed connusant of any private instructions from the principal to the agent, but where the agency is a special and temporary one, there the principal is not bound if the agent exceeds his employment." This apparently clear distinction having been made the courts almost unanimously, until very recent years, applied it in deciding whether or not a principal was to be bound by the acts of his agent. Many of them even went further and held that the persons

dealing with the special agent were bound at their peril to know the extent of his authority—not his ostensible or apparent—but his actual authority.⁹ Even in very recent years we find the same rule adhered to.¹⁰

The fallacy of the doctrine was exposed so long ago that there can be no justification at the present day for adherence to it. Justice Story was one of the first to clearly point out that the true test of liability must be found, not in any distinction as to the classification of the agent, but in the authority which the principal had held the agent out to the world to possess.¹¹ Mr. Kent also detected the fallacy of the old rulings, but could not altogether break away from them. His statement is accordingly a curious combination of the old and the new. "Whoever deals with an agent constituted for a special purpose, deals at his peril when the agent passes the precise limits of his power; though if he pursues the power as exhibited to the public, his principal is bound, even if private instructions had still further limited the special power."¹² The same confused idea is to be found in the recent work on Contracts by Mr. Page. The old rule is there set forth, but with the new idea grafted on it.¹³

Notwithstanding the fact that it has often been pointed out¹⁴ that at least as regards third persons, there is no valid distinction between general and special agents, the classification is generally retained. Certain states have even incorporated it in their codes.¹⁵

It seems impossible, however, to make any logical distinction whatsoever between the two classes. At the outset we are met

(3) 1 Am. & Eng. Enc., 2nd ed., p. 985.
(4) *Kelth v. Optical Co.*, 48 Ark. 138; *Wood v. McCain*, 7 Ala. 800, 42 Am. Dec. 612; 2 Bouv. Inst. 14.

(5) Dr. & St. d. 2, c. 42; *Noy's Maxims*, c. 44.

(6) *Hooe v. Oxley*, 1 Wash. 19.

(7) *Blane v. Proudfit*, 3 Call. 207, 2 Am. Dec. 546.

(8) 15 Johns. 44, 8 Am. Dec. 219.

(9) *Mayor, etc., of Baltimore v. Reynolds*, 20 Md. 1; *Bohart v. Oberse*, 36 Kan. 284; *Bond v. P. O. & P. A. R. Co.*, 62 Mich. 643.

(10) *Cleveland v. Pearl*, 63 Vt. 127; 1 Am. & Eng. Enc. p. 993.

(11) Agency, sec. 127.

(12) Lect. 41 *p. 621.

(13) Sec. 967.

(14) Mechem, Agency, sec. 285; *Huffcutt Agency*, sec. 104.

(15) Cal. Civ. Code, sec. 2297, Mont. Civ. Code, sec. 3092.

with the divergencies in the very definitions of the terms, already pointed out. In case we accept the one preferred by most courts, that a general agent is one appointed to perform all acts connected with a particular business or employment, while a special agent is one appointed to do a single act, we are confronted with the situation that as regards the doing of the particular act, the special agent may have substantially all the powers of a general agent. If his task be to sell a certain chattel he may sell it in any of the ways customary, and may give such warranties as are usually given by the vendor of such an article. If he acts in accordance with the general custom in such a case the principal is liable. The authority of an agent, no matter whether he be termed general or special as regards third persons, includes the authority to do everything necessary or proper in the ordinary course of the particular business in hand.

As regards the public, neither agent can be restrained by secret instructions given by the principal. In neither case can a third person rely on the statements of the agent regarding his own authority.¹⁶ With both classes of agents the burden of proof is on the person dealing with the agent to show that he possessed the authority, either actual or ostensible, to perform the particular act.¹⁷

Naturally a person deputed to perform a particular act would not be clothed with as great authority as if he were to transact a general business. But the difference is only one of degree, and does not justify a separate classification of the two agents. The distinction of Mr. Mechem¹⁸ that the nature of the work to be transacted by a special agent implies limitations of power which a third person must inquire into, while a general agent has power to do all that is customary in the business entrusted to him, so that there is no duty on the third person to make any inquiry does not seem valid. In both cases, as has been stated,

the agent has power to do all that is customary in the circumstances. There is as much duty to inquire in regard to any questionable act on the part of the agent in the one case as in the other. More careful inquiry may in some cases be necessary where the agent has so-called special powers, but only because less may be known of the powers of the agent and fewer customs annexed to the performance of the particular act. This difference, however, is not inherent.

It is often said of a special agent that his authority must be strictly pursued else the principal will not be bound.¹⁹ The same rule applies, however, to the general agent. The confusion arises out of the interpretation of the word "authority." The idea cannot be too firmly impressed that, except between the agent and his principal, it is the ostensible, and not the actual authority that must settle the question of the principal's liability.

That fact does not, however, excuse a lack of due diligence on the part of a third person in ascertaining as best he can in the circumstances, the extent of the agent's authority. If settled customs exist in regard to a particular incident of the transaction the third person may presume that the agent has the power to act in accordance with such customs. But in a doubtful case it is his duty to ascertain as best he can, the actual authority of the agent.

In brief, it may safely be stated that the two classes of agents considered stand upon the same footing. Though they may differ in the matter of the amount of work entrusted to them, this difference is but accidental, and does not justify the application of different rules in settling questions of liability. In either case the liability of a principal is to be measured, not by the actual authority conferred, but by the ostensible authority that the agent has been held out to the world as possessing.

R. L. McWILLIAMS.

Spokane, Wash.

(16) *Credit Co. v. Machine Co.*, 54 Conn. 150.

(17) *Pale v. Leask*, 33 L. J. Ch. (N. S.), 155.

(18) *Agency*, sec. 285.

(19) *Pursley v. Morrison*, 7 Ind. 256, 63 Am. Dec. 424.

NEGLIGENCE—LIABILITY OF MANUFACTURERS OF FOOD PRODUCTS FOR INJURIES TO THIRD PERSONS.

TOMLINSON v. ARMOUR & CO.

Court of Errors and Appeals of New Jersey,
June 15, 1908.

Irrespective of the presence, or absence, of contractual obligations arising out of the dealings between manufacturer and retailer, and between retailer and consumer, the manufacturer of canned goods is under a duty to him who, in the ordinary course of trade, becomes the ultimate consumer, to exercise care that the goods, which he puts into cans and sells to retail dealers, to the end that such dealers may sell the same to customers and patrons as food, are wholesome and fit for food, and not tainted with poison.

PITNEY, C.: This writ of error is brought to review a decision of the Supreme Court sustaining defendant's demurrer to plaintiff's declaration. The plaintiff's declaration sets forth that the defendant was engaged in the business of putting up in tin cans or vessels, and vending, meats or ham for food and domestic use, and did put up a certain can of ham for food and domestic use which was sold by the defendant to a retail dealer, to be sold to customers and patrons; that plaintiff purchased said can of ham from said retailer for food and domestic use; that the defendant "so carelessly, negligently, recklessly, and improperly put up, in said can of ham, diseased, unfit, and unwholesome pork or ham, which was deleterious and poisonous to the human body and health; that the plaintiff after purchasing said can of ham, and without fault or negligence on her part, ate a piece of ham taken from said can, and in consequence thereof, became poisoned and sick with ptomaine poison." Defendant's demurrer raised certain formal objections that under the old practice could have been raised only by special demurrer, and are now available only on motion to strike out. *Van Horn v. Central R. R. Co.*, 38 N. J. Law, 133, 139; *Race v. Easton & Amboy R. R. Co.*, 41 N. J. Law, 536, 539, 41 Atl. 710; *Minnuci v. Phila. & Reading R. R. Co.*, 68 N. J. Law, 432, 53 Atl. 229; *Jackson v. Penna. R. R. Co.*, 69 N. J. Law, 79, 54 Atl. 532; *Karnuff v. Kelch*, 69 N. J. Law, 499, 55 Atl. 163. These objections the Supreme Court properly disregarded.

The only question properly raised by the demurrer, is whether, upon the facts stated in the declaration, and in the absence of scienter, there is a liability on the part of the defendant. The Supreme Court held there was none; and this, upon the ground that at com-

mon law, upon a sale of food or provisions by a manufacturer to a dealer, there is no implied warranty of wholesomeness, and that, assuming a different rule exists in the case of a sale by such dealer to a consumer, yet the consumer, in the absence of a statute, cannot hold the manufacturer or original vendor to a higher degree of duty than that cast upon him by common law with respect to his own vendee. In our opinion the Supreme Court erred in making the question of defendant's liability turn upon the existence or non-existence of a warranty. Whether a warranty be express or implied, it is a matter of contract, rendering the maker liable in case of breach, notwithstanding he used all care to prevent a breach, but rendering him liable in ordinary circumstances only to the party with whom he contracted, or to others for whose benefit the contract was made. Assuming (without deciding) that there is no implied warranty, on the part of the manufacturer of canned food, that the goods shall be wholesome and fit to be eaten, it by no means follows from this that there is no duty resting upon the manufacturer to exercise care that the contents of the cans, which it puts upon the market to be sold for food and domestic use, are, in fact, food, rather than poison.

In this state we have repeatedly held that where a duty arises solely out of a contract, no one can bring an action for its breach unless he be a party to the contract, or one for whose benefit it is made. *Marvin Safe Co. v. Ward*, 46 N. J. Law, 19; *Styles v. Long Co.*, 67 N. J. Law, 413, 417, 51 Atl. 710; same case at a later stage, 70 N. J. Law, 301, 57 Atl. 448; *Conklin v. Staats*, 70 N. J. Law, 773, 59 Atl. 144. But in these cases liability was denied upon the ground that, aside from the contract, there was no duty incumbent upon the defendant. In the case in 46 N. J. Law, 19, *Ward* was subject to a contractual obligation to build a bridge in accordance with his contract, and was under no other duty. The contract was subject to modification and waiver as between the parties. In the *Styles* case, as reported in 67 N. J. Law, 413, 417, 51 Atl. 710, it appeared that the trial judge had submitted to the jury the contractual obligation to light the footbridge, arising out of defendant's agreement with the board of freeholders as forming in and of itself a sufficient basis for imposing upon the defendant the duty of exercising care towards the public, for breach of which duty the plaintiff, as one of the public, could maintain an action of tort; and that the stipulations of the contract were adopted as the sole criterion for determining what precautions were necessary to be taken by the defendant in order to fulfill the duty in ques-

tion. It was held by the Supreme Court that this was error. In the case, in 70 N. J. Law, 301, 57 Atl. 448, it was held by this court that the contractual obligation created no liability toward the traveling public, and that the Long Company was not liable under the doctrine of invitation, because it was the county authorities who had invited the public to use the bridge, and not the bridge builder. In *Conklin v. Staats*, the scow that was damaged was berthed by the defendant at a place where there was a submerged pile, upon which the plaintiff's scow was impaled when the tide fell. There was no notice to the defendant of cause defendant had contracted with a third party to remove all old piles, it was contended the existence of the submerged pile, but be that it thereby came under a general duty to the public, including the plaintiff. This court held that the plaintiff, not being a party to that contract, could not maintain an action of tort in respect to the breach of a duty that arose solely from its provisions.

In *Styles v. Long Co.*, 70 N. J. Law, 302, 57 Atl. 448, Mr. Justice Swayze, speaking for this court, cited some distinguishable cases, where the existence of the contract creates a situation that subjects the parties to duties that are independent of the obligation to perform the contract, instancing the duty of carriers of passengers (*Marshall v. York, etc., Ry. Co.*, 11 C. B. 655), the duty of a vender of drugs (*Thomas v. Winchester*, 6 N. Y. 397, 57 Am. Dec. 455), the duty of the vender of a gun to a person for whom it was bought (*Langridge v. Levy*, 2 M. & W. 519, 4 M. & W. 337), the duty of a person who participates in the management of a highly dangerous agency (*Van Winkle v. American Steam Boiler Co.*, 52 N. J. Law, 240, 19 Atl. 472), the duty of a county clerk under the statute in canceling a mortgage (*Appleby v. State*, 45 N. J. Law, 161), as cases where the duty was held to be a positive duty, independent of the contract, although arising out of a state of facts created by the contract.

Coming, then, to consider the facts of the present case as averred in the declaration, and dealing with them, irrespective of the presence or absence of contractual obligations arising out of the dealings between manufacturer and retailer and between retailer and consumer, the question is whether the manufacturer is under a duty to him who, in the ordinary course of trade, becomes the ultimate consumer to exercise care that the goods, which he puts into cans and sells to retail dealers, to the end that such dealers may sell the same to customers and patrons as food, are wholesome and fit for food, and not tainted with poison. Canned goods are, at

the present day, in such common use that we may judicially recognize that the contents are sealed up, not open to the inspection or test, either of the retailer, or of the customer, until they are opened for use; and not then susceptible to practical test, except the test of eating. When the manufacturer puts the goods upon the market in this form for sale and consumption, he, in effect, represents to each purchaser that the contents of the can are suited to the purpose for which it is sold, the same as if an express representation to that effect were imprinted upon a label. Under these circumstances the fundamental condition upon which the common-law doctrine of caveat emptor is based—that the buyer should “look out for himself”—is conspicuously absent; for he has no opportunity to look out for himself. And when he thus buys and eats the contents of the package, relying upon the assurance of the manufacturer that they are fit to be eaten, it seems to us to result from general and fundamental principles that he has a right to insist that the manufacturer shall at least exercise care that they are so fit, and are not unwholesome and poisonous.

Among the most fundamental of personal rights, without which man could not live in a state of society, is the right of personal security, including the “preservation of a man's health from such practices as may prejudice or annoy it” (1 Black. Com. 129, 134)—a right recognized, needless to say, in almost the first words of our written Constitution (Const. art. 1, par. 1). To assert, therefore, that one living in a state of society, organized, as ours is, according to the principles of the common law, need not be careful that his acts do not endanger the life or impair the health of his neighbor seems to offend against the fundamentals. Upon what other fundamental principle does the rule rest that one who uses a highway must be careful not to collide with his neighbor? Upon what other fundamental principle does the law of libel and slander rest? Or the rule, recently laid down by this court in *Brennan v. United Hatters*, 73 N. J. Law, 729, 744, 65 Atl. 165, 9 L. R. A. (N. S.) 254, 118 Am. St. Rep. 727, that any act is wrongful which, in the ordinary course, will infringe upon the rights of another to his damage, except it be done in the exercise of an equal or superior right?

In *Langridge v. Levy*, 2 M. & W. 519, 4 M. & W. 337, plaintiff's father bargained with defendant to buy of him a gun, for the use of himself and sons, and the defendant, by falsely and fraudulently warranting the gun to have been made by N., and to be a good, safe, and secure gun, sold the gun to plaintiff's father,

and the plaintiff, knowing and confiding in the warranty, used the gun, which in his hands, by reason of its weak, dangerous, and insufficient construction and materials, burst, whereby plaintiff was injured. Held, by the Courts of Exchequer and of Exchequer Chamber, that the action was maintainable, on the ground "that, as there is fraud and damage, the result of that fraud, not from an act remote and consequential, but one contemplated by the defendant at the time as one of its results, the party guilty of the fraud is responsible to the party injured." This case of itself is, of course, not an authority closely in point with the case before us, for here there is no averment of fraud, but only of negligence. But in *George v. Skivington*, L. R. 5 Exch. 1, where the declaration alleged that the defendant carried on the business of a chemist, and in the course of his business professed to sell a chemical compound, made of ingredients known only to him, and by him represented to be fit to be used for a hair wash, and the plaintiff J. G. thereupon bought of the defendant a bottle of this hair wash, to be used by his wife, the plaintiff E. G., as the defendant then knew, and averred that the defendant had negligently and unskillfully prepared the hair wash, so that by reason thereof it was unfit to be used for washing the hair, whereby the female plaintiff, who used it for that purpose, was injured, it was held by the Court of Exchequer on demurrer that a good cause of action was disclosed. This decision was based upon the authority of *Langridge v. Levy*, it being held that the duty was of a similar character; one of the barons saying: "Substitute the word 'negligence' for 'fraud,' and the analogy between *Langridge v. Levy* and this case is complete." *Longmeid v. Holliday*, 6 Exch. 761, was distinguished, but upon grounds that are not very satisfactory. In the latter case it was held that a tradesman, who contracts with an individual for the sale to him of an article to be used (in this instance a lamp) for a particular purpose by a third party, is not, in the absence of fraud, liable for injury caused to such person by some defect in the construction of the article. In this case the declaration averred that there was a fraudulent representation that the lamp was safe; but of this there was no proof at the trial. There was no averment, in the declaration, of negligence on the part of the defendant in the manufacture of the lamp. The decision may perhaps be sustained upon this ground.

The leading American case is *Thomas v. Winchester* (1852) 6 N. Y. 397, 57 Am. Dec. 455. This is a well considered case, and holds that a dealer in drugs and medicines, who carelessly labels a deadly poison as a harmless medicine,

and sends it so labeled into market, is liable to all persons who, without fault on their part, are injured by using it as such medicine in consequence of the false label; that such liability arises, not out of any contract or privity between the dealer and the person injured, but out of the duty which the law imposes upon the former to avoid acts in their nature dangerous to the lives of others. This decision has been cited with approval by our supreme court as a typical instance of the duty imposed, on public grounds, upon any person who undertakes the performance of an act which, if not done with care and skill, will be dangerous to the persons or lives of others; the duty being to exercise such care and skill. *Van Winkle v. American Steam Boiler Company*, 52 N. J. Law, 240, 247, 19 Atl. 472. And this court has already approved *Thomas v. Winchester* to the extent that it held the chain of causation was not broken by the innocent acts of the intervening parties who, in reliance upon the label, bought and sold the poison until it came to her who finally used it as a machine. *Del. Lack. & Western R. R. Co. v. Salmon*, 39 N. J. Law, 299, 310, 23 Am. Rep. 214. The doctrine of *Thomas v. Winchester* has been recognized and approved in Massachusetts. See *Norton v. Sewall*, 106 Mass. 143, 144, 8 Am. Rep. 298. And in *Bishop v. Weber* (1885) 139 Mass. 411, 1 N. E. 154, 52 Am. Rep. 715, an action of tort was sustained against a caterer for improperly and negligently furnishing unwholesome and poisonous food. *Allen, J.*, said: "This liability does not rest so much upon an implied contract as upon a violated or neglected duty voluntarily assumed. Indeed, where the guests are entertained without pay, it would be hard to establish an implied contract with each individual. The duty, however, arises from the relation of the caterer to the guests. The latter have a right to assume that he will furnish for their consumption provisions which are not unwholesome and injurious through any neglect on his part. The furnishing of provisions which endanger human life or health stands upon the same ground as the administering of improper medicines, from which a liability springs irrespective of any question of privity of contract between the parties."

In *Blood Balm Co. v. Cooper* (1889) 83 Ga. 457, 10 S. E. 118, 5 L. R. A. 612, 20 Am. St. Rep. 324, it was held, upon the authority of *Thomas v. Winchester*, that the proprietor of a patent medicine, who puts upon the bottle containing it a prescription that it is to be taken in certain quantities, and sells it to a druggist for resale to any who may wish it, is liable for any injury sustained, on account of its poisonous effect, by one who buys it of the druggist, and uses it according to the prescription. The court

said: "The liability of the plaintiff in error to the person injured arises, not by contract, but for a wrong committed by the proprietor in the prescription and direction as to the dose that should be taken. We can see no difference, whether the medicine was directly sold to the defendant in error by the proprietor, or by an intermediate party, to whom the proprietor had sold it in the first instance for the purpose of being sold again. It was put upon the market by the proprietor, not alone for the use of druggists to whom they might sell it, but to be used by the public in general, who might need the same for the cure of certain diseases, for which the proprietor set forth in his label the same was adapted. This was the same thing as if the proprietor himself had sold this medicine to the defendant in error, with his instructions and directions as to how the same should be taken."

A recent Minnesota case, *Schubert v. J. R. Clark Co.* (1892) 49 Minn. 331, 51 N. W. 1103, 15 L. R. A. 818, 32 Am. St. Rep. 559, perhaps extends the doctrine of *Thomas v. Winchester* further than we need to go in the present case. There one Phelps had ordered a new stepladder from a retail merchant, for the use of the plaintiff, who was a house painter in the employ of Phelps. The merchant, not having such a ladder in his stock, ordered the defendant corporation to deliver such a ladder to the plaintiff for his use. Pursuant to this order defendant delivered a ladder to the plaintiff, which was made of poor, crossgrained, and decayed lumber, but was so painted that neither the plaintiff nor his employer nor the merchant could discover the defects. Plaintiff, supposing the ladder to have been made of good material, proceeded to use it in the performance of his work, when it broke under his weight, and he was thereby injured. The liability was sustained.

Craft v. Parker Webb & Co. (1893) 96 Mich. 245, 55 N. W. 812, 21 L. R. A. 139, is a case more closely in point, and is, we deem, a reliable authority.

In *Huset v. J. I. Case Threshing Mach. Co.* (1903) 120 Fed. 865, 57 C. C. A. 237, 61 L. R. A. 303, the precise question was this: "Is a manufacturer or vender of an article or machine which he knows, when he sells it, to be imminently dangerous, by reason of a concealed defect therein, to the life and limbs of any one who shall use it for the purpose for which it was made and intended, liable to a stranger to the contract of sale, for an injury which he sustains from the concealed defect while he is lawfully applying the article or machine to its intended use?" Sanborne, J., in the course of a somewhat elaborate opinion, approves arguing the doctrine of *Thomas v. Winchester*,

Bishop v. Weber, and other cases of that character.

In *Salmon v. Libby* (1905) 219 Ill. 421, 76 N. E. 573, the declaration alleged, in substance, that the defendant prepared, put up in a package, and sold to the trade, certain mince meat, which, in the due course of business, passed through the hands of a wholesale dealer, a retail dealer, and finally was made into a pie, of which plaintiff's testator ate; that the defendant negligently and improperly prepared and manufactured the mince-meat in question; that as a result the same became unfit for food, and poisonous and destructive to human life when used as food; and that plaintiff's testator, lawfully partaking of the same, was poisoned, and lost his life in consequence thereof. There was no averment of a scienter, the declaration counting upon the negligence alone. The Supreme Court of Illinois held that this set forth a good cause of action, under a statute permitting a recovery for the death of a person caused by the wrongful act or omission of another.

Upon both reason and authority we are clearly of the opinion that the declaration before us sets up a good cause of action. The fact that the defendant was the manufacturer, presumably having knowledge, or opportunity for knowledge, of the contents of the cans and of the process of manufacture; that it put the goods upon the market for sale by dealers to consumers, under circumstances such that neither dealer nor consumer had opportunity for knowledge of the contents; the fact that the goods were thus manufactured and marketed under circumstances that imported a representation to intending purchasers that they were fit for food and beneficial to the human body; that in the ordinary course of business there was a probability (it being, indeed, the very purpose of the defendant) that the goods should be purchased, and used by parties purchasing, in reliance upon the representation; and that the defendant negligently prepared the food so that it was unwholesome and unfit to be eaten, and poisonous to the human body, whereby the plaintiff was injured—make a case that renders the defendant liable for the damages sustained by the plaintiff thereby.

Let the judgment be reversed, and the record be remitted to the Supreme Court, to the end that the defendant may apply there for leave to withdraw its demurrer and plead to the merits.

NOTE—*Implied Warranty by Manufacturer in Sale of Injurious Foods, etc.*—The decision in the principal case was decided in the court of errors upon a different ground from that which was considered by the Supreme Court below. Actions for negligence are for breaches of duty.

Actions on contracts are for breaches of agreement. Hence, the limits of liability for negligence are not the limits of liability for breaches of contracts and actions for negligence, often accrued where actions upon contracts did not arise and vice versa.

In the principal case, the court is careful to say that the question whether or not a liability would exist upon an implied warranty is one that they do not decide. In the court below (65 Atl. 883) the court lays down the doctrine that at common law on a sale of food articles between a dealer in provisions and a retailer there was no implied warranty of wholesomeness. Assuming that a different rule exists in a case of the sale by such a dealer to a consumer, the latter, in the absence of statute cannot hold the original vendee to a higher degree of duty than that cast upon him by the common law, with respect to his own vendee. And further that to select out of the entire class of transactions covered by a well established rule of the common law a single mode for the imposition of a different rule, based upon considerations of public welfare, is essentially a legislative function and that therefore the facts set forth in the declaration that the defendant had packed diseased ham in a can and had sold it to a retail dealer, of whom it was bought by plaintiff, who from eating a piece of such ham became sick, that these facts do not constitute a cause of action. Whether or not, as has been before stated, this rule of the court below was a correct statement of the law, the higher court does not pass upon.

While the English authorities would seem to support the doctrine that there is no implied warranty in such a case, yet, that great old master of common law, Blackstone, 3d Vol. page 165, laid down the doctrine that in contracts for provisions it was always implied that they are wholesome, and that if they are not wholesome, an action on a case for deceit, lies against the vendor. He cites no authority for this proposition, and it may be safely assumed, that it probably appeared to him to be a doctrine founded upon sound common sense, and public policy, so manifestly just that citations were not required. That there is no implied warranty, it is said in the American & English Encyclopedia of Law, second edition, page 1237, is the rule adopted in the United States, at least to this extent that there is no implied warranty of soundness or wholesomeness arising from sale of food provisions to a dealer or middleman, who buys on the market not for consumption, but for sale to others. As illustrations of this doctrine a case is given where a live cow is sold by a farmer to a retail butcher, there being no implied warranty that she is fit for food, although the seller knows that the animal is bought to be cut up for meat or immediate domestic consumption. Howard v. Emerson, 110 Mass. 320. And in another case, where a drover sold beef cattle to a butcher, it was held that he did not impliedly warrant that they were not bruised. But even the doctrine announced in the two latter illustrations, is not followed by all courts or at least has been somewhat limited. Thus, in the case of Sinclair v. Hathaway, 57 Mich. 60, it was held that a baker who sold bread to a peddler, whom he knew was to retail it, impliedly warranted the bread to be wholesome, and while the doctrine of

this case seems to be somewhat in the minority, yet it seems to express the true rule which ought to be, if it is not supported by authority, i. e.: That where a person sells an article to another, which he knows or ought to know is to be used for a particular purpose, he impliedly warrants no matter whether the purchaser is a wholesaler, retailer or a consumer, that the article is fit for the purpose for which he knows it will be used. Especially is this true where the seller knows or ought to know that the article is not fit for the use intended. If a person sold cattle to a butcher, which were diseased, not knowing that fact, or having no means of knowing such fact, then there might possibly be some excuse for holding that there is no implied warranty, but where the seller prepares the article himself, then he knows or should know, how the article is prepared, and if not properly prepared, there certainly would be no injustice in holding that he is responsible, on an implied warranty. In the Encyclopedia before referred to, page 1237, the doctrine is laid down that in all cases in the sales of food by a retail dealer for domestic use, an implied warranty exists, that they are fit for use and wholesome. However, upon this doctrine there is a distinction drawn where the purchaser has no right to assume that the middleman who is acting as seller, knew the quality of the article. Julian v. Laudenberger, 16 Misc. (N. Y.) 646. Even in such a case it seems that the retailer ought to be held responsible because if he does not know, he ought to know, whether the article is fit for use.

General Rule as to Contractual Liability of Manufacturer of Injurious Foods, to Consumer.

—It is a general rule, that a contractor, manufacturer or vendor is not liable to third parties, who have no contractual relations with him, for negligence in the construction, manufacture or sale of the articles he handles. Where this doctrine is applied it is because the makers, vendors or furnishers owed no duty to strangers, in their contracts of construction, sales or furnishing: Examples of this holding are as follows: A stage-coach,—Winterbottom v. Wright, 10 Mees. & W. 109; a leaky lamp,—Longmeid v. Holliday, 6 Exch. 764, 65; a defective chain furnished one to load stone,—Blakemore v. Bristol & E. R. Co., 8 El. & Bl. 1035; an improperly hung chandelier,—Collins v. Selden, L. R. 3 C. P. 495, 497; an attorney's certificate of title,—National Sav. Bank v. Ward, 100 U. S. 195, 204, 25 L. Ed. 621, 624; a defective valve in an oil car,—Goodlander Mill Co. v. Standard Oil Co., 27 L. R. A. 583, 11 C. C. A. 253, 259, 24 U. S. App. 7, 63 Fed. 401, 406; a porch on a hotel,—Curtin v. Somerset, 140 Pa. 70, 12 L. R. A. 322, 21 Atl. 244; a defective side saddle,—Bragdon v. Perkins-Campbell Co., 30 C. C. A., 567, 58 U. S. App. 1, 87 Fed. 109; a defective rim in a balance wheel,—Loop v. Litchfield, 42 N. Y. S. 351, 359, 1 Am. Rep. 513; a defective boiler,—Losee v. Clute, 51 N. Y. S. 404, 10 Am. Rep. 623; a defective cylinder in a threshing machine,—Heizer v. Kingsland & D. Mfg. Co., 110 Mo. 605, 617, 15 L. R. A. 821, 19 S. W. 630; a defective wall which fell on a pedestrian,—Daugherty v. Herzog, 145 Ind. 255, 32 L. R. A. 837, 44 N. E. 457; a defective rope on a derrick,—Burke v. De Castro & Sugar Ref. Co., 11 Hun, 354; a defective shelf for a workman to stand upon in placing ice in a box,—

Swan v. Jackson, 55 Hun, 194, 7 N. Y. S. 821; a defective hoisting rope of an elevator.—Barrett v. Singer Mfg. Co., 1 Sweeny, 545; a runaway horse.—Carter v. Harden, 78 Me. 528, 7 Atl. 302; a defective hook holding a heavy weight in a drop press.—McCaffrey v. Mossberg & G. Mfg. Co., 23 R. I. 581, 55 L. R. A. 822, 50 Atl. 651; a defective bridge.—Marvin Safe Co. v. Ward, N. J. L. 19; shelves in a dry goods store whose fall injured a customer.—Burdick v. Cheadle, 26 Ohio St. 393, 20 Am. Rep. 767; a staging erected by a contractor for the use of his employees.—McGuire v. McGee, (Pa.), 13 Atl. 551; defective wheels.—J. I. Case Plow Works v. Niles & S. Co., 90 Wis. 590, 63 N. W. 1013.

To this general doctrine, Federal Circuit Judge Sanborn, in *Huset v. Case Threshing Machine Co.*, 120 Fed. 855, says that there are three exceptions. The first is that an act of negligence of a manufacturer or vendor, which is eminently dangerous to the life or health of mankind, and which is committed in the preparation or sale of the article intended to preserve, destroy or affect human life, is actually to third parties who suffer from the negligence, citing *Dixon v. Bell*, 5 Maule & S. 198; *Thomas v. Winchester*, 6 N. Y. 397; 57 Am. Dec. 455; *Norton v. Sewall*, 106 Mass., 143, 8 Am. Rep. 298; *Elkins v. McKean*, 79 Pa. 402, 502; *Bishop v. Weber*, 139 Mass. 411, 52 Am. Rep. 715; 1 N. E. 154; *Perers v. Johnson*, 50 W. Va. 644, 57 L. R. A. 428, 41 S. E. 190, 191. The second exception, is that an owner's act of negligence which causes injury to one who is invited by him to use his defective appliance upon the owner's premises, may form the basis of the action against the owner, citing: *Coughtry v. Globe Woolen Co.*, 56 N. Y. 124, 15 Am. Rep. 387; *Bright v. Barnett & R. Co.*, 88 Wis. 299, 26 L. R. A. 524, 60 N. W. 418, 420; *Heaven v. Pender*, L. R. 11 Q. B. Div. 503; *Roddy v. Missouri P. R. Co.*, 104 Mo. 234, 241, 12 L. R. A. 746, 15 S. W. 112. The third exception to the rule is that one who sells or delivers an article which he knows to be eminently dangerous to life or limb of another without notice of its qualities is liable to any person who suffers an injury therefrom which might have been reasonably anticipated whether there were any contractual relations between the parties or not, citing: *Langridge v. Levy*, 2 Mees. & W. 519, 4 Mees. & W. 337; *Wellington v. Downer Kerosene Oil Co.*, 104 Mass. 64, 67; *Lewis v. Terry*, 111 Cal. 39, 31 L. R. A. 220, 43 Pac. 398.

The principal case rather comes under the first exception made to the general rule, although it might likewise be founded upon the third exception, but whether founded either upon the first or third exception, there is no doubt but what the doctrine sustained by the court of errors in the principal case is correct and sound. Especially is this true when it is based upon the doctrine that where a manufacturer produces an article of food that he owes a duty to the public or any purchaser that the article is wholesome and fit for consumption but it seems to the writer that the principal case might not only be upheld upon the doctrine that the manufacturer owes a duty of that character, but it might also be sustained upon the doctrine that in such cases there is an implied warranty upon the part of the manufacturer that the article is of the character it should be and that this warranty is for the benefit of

whoever may ultimately use this article for the purpose for which it was manufactured and that not only the retailer, or the middle man, would have a right of recovery against the manufacturer, that it was not such as it should be, but that the consumer while having no contractual relations with the manufacturer would have a right to recover from the manufacturer on an implied warranty. And that such right of action directly against the producer, would be justified further to prevent a circuitry of action. If the retailer is responsible, as a matter of justice, he should be permitted, being innocent in the matter, to recover from the person who sold him the goods, and so on ad infinitum.

Wm. M. ROCKEL.

Springfield, Ohio.

JETSAM AND FLOTSAM.

DEPOSITING MONEY WITHOUT A WITNESS OR RECEIPT.

An Irish farmer at a fair, not wishing to carry £100 in his pocket, left it in charge of the landlord of the public house. When he returned soon after, the landlord denied he had ever received any such money. Curran was consulted as to the best remedy. He told the farmer to take a friend with him, and go and speak very civilly to the landlord, and say he was convinced he must have left £100 with some other person, and leave another £100 with him. The farmer did so, but could not see what use this could be. On further consultation, Curran advised him to go by himself to the landlord and ask for the £100, and the farmer did so and received the money. But he said he was no better off, for that did not bring back the first £100. Curran then advised the farmer to go again with his friend who witnessed the deposit of the second £100, and ask him for £100 he saw him leave. The wily landlord saw he was taken off his guard, and gave up the first £100, so that the farmer joyfully went and thanked his counsel for the success of this stratagem.—*Madras Law Journal*.

BOOKS RECEIVED.

Cyclopedia of Law and Procedure. William Mack, LL. D., Editor-in-Chief. Volume 29. New York. The American Law Book Company. London: Butterworth & Co., 12 Bell Yard. 1908. Review will follow.

The Encyclopaedia of Evidence. Edited by Edgar W. Camp. Vol. 12. Los Angeles, Cal. L. D. Powell Company. 1908. Review will follow.

The American State Reports, containing the Cases of General Value and Authority Subsequent to those Contained in the "American Decisions" and the "American Reports," Decided in the Courts of Last Resort of the Several States. Selected, Reported, and Annotated. By A. C. Freeman. Volume 120. San Francisco: Bancroft-Whitney Company, Law Publishers and Law Booksellers. 1908. Review will follow.

A Treatise on Facts or the Weight and Value of Evidence. By Charles C. Moore. Volumes 1 and 2. Northport, Long Island, N. Y. Edward Thompson Company. 1908. Buckram. Price. \$12.00. Review will follow.

Probate Reports Annotated. Containing Recent Cases of General Value Decided in the Courts of the Several States on Points of Probate Law. With Notes and References. By William Lawrence Clark, Author of Clark on Contracts, Clark and Marshall on Corporations, etc. Vol. 12. New York. Baker, Voorhis & Company. 1908. Price, \$5.50. Review will follow.

Martin's Mining Law and Land Office Procedure, with Statutes and Forms. By Theodore Martin, of the Los Angeles, California, Bar, (formerly of the Colorado Bar). San Francisco. Bender-Moss Company. 1908. Review will follow.

The Negotiable Instruments Law, from the Draft Prepared for the Commissioners on Uniformity of Laws, and Enacted in Alabama, Arizona, Colorado, Connecticut, District of Columbia, Florida, Idaho, Illinois, Iowa, Kansas, Kentucky, Louisiana, Maryland, Massachusetts, Michigan, Missouri, Montana, Nebraska, Nevada, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, Rhode Island, Tennessee, Utah, Virginia, Washington, West Virginia, Wisconsin, and Wyoming. The Full Text of the Law as Enacted, with Copious Annotations. By John J. Crawford, of the New York Bar, by Whom the Statute was Drawn. Third Edition. New York: Baker, Voorhis and Company. 1908. Price, \$3.00. Review will follow.

Report of the Board of Statutory Consolidation. 1907. State of New York. General Report. Albany, N. Y. J. B. Lyon Company, State Printers. 1908.

Report of the Board of Statutory Consolidation of the State of New York. Consolidated Laws. In Six Volumes. Albany, N. Y. J. B. Lyon Company, State Printers. 1907.

HUMOR OF THE LAW.

"You say you met the defendant on a street car, and that he had been drinking and gambling," said the attorney for the defense during the cross examination.

"Yes," replied the witness.

"Did you see him take a drink?"

"No."

"Did you see him gambling?"

"No."

"Then how do you know," demanded the attorney, "that the defendant had been drinking and gambling?"

"Well," explained the witness, "he gave the conductor a blue chip for his car fare, and told him to keep the change."

The Legal Bird on musty leaves doth sit
And sings his old refrain. "To-wit, to-wit."

Oh Bosh!—An item in the New York Sun, says that Magistrate Harris the other day asked a witness in an assault case for his name, and what he saw of the fight. In answer, the witness said: "Bosh. I saw these tw—." But the magistrate interrupted him, "What do you mean by 'bosh,' sir. Kindly answer my question, sir, and give me your name."

"Oh, Bosh, Bosh. I saw these two—."

But again he was interrupted. "John," asked

the magistrate of the officer, "is this man intoxicated or crazy?"

"No, Judge, I know this man. His name is Oscar Bosh. He did not mean Oh, bosh!" explained the policeman.

"O-o-o-oh, now I understand," said the magistrate.

WEEKLY DIGEST.

Weekly Digest of ALL Current Opinions of ALL the State and Territorial Courts of Last Resort, and of all the Federal Courts.

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1. **Accident Insurance**—Burning Buildings.—A policy covering accidents "caused by the burning of a building" held to include the case of a death caused by the burning of the contents of a room.—Houlihan v. Preferred Acc. Ins. Co. of New York, 111 N. Y. Supp. 1048.

2. **Accord and Satisfaction**—Payment by Check.—Where a check is sent which is claimed to be in full payment of a claim, the receipt and retention thereof by the payee without objection is an accord and satisfaction of the claim.—Rauh v. Wolf, 110 N. Y. Supp. 923.

3. **Admiralty**—Libel.—Where a libel in form ad personam was answered, defended, and decided as such, it was not error to refuse to permit respondent to amend after decision so as to claim that an action in rem was the proper remedy.—Samuel v. Horsley Line, U. S. C. C. of App., Third Circuit, 161 Fed. Rep. 909.

4.—**Negligence.**—A libel in admiralty was maintainable by a steamboat passenger on the Great Lakes, because of her being assaulted and robbed, owing to the steamboat's negligence in the performance of the passenger's transportation contract.—*The Western States*, U. S. C. C. of App., Second Circuit, 159 Fed. Rep. 354.

5.—**Appeal and Error.**—Bill of Exceptions.—Where depositions ordered sent up to the Supreme Court under rules of practice of the Supreme Court, rule 27, were not set out in the bill of exceptions, they could not be considered.—*Jefferson v. Sadler*, Ala., 46 So. Rep. 969.

6.—**Decree Pro Confesso.**—The exercise of the discretion of the trial court to set aside a decree pro confesso will not be interfered with on appeal, unless there has been a gross abuse of discretion.—*Prout v. Dade County Security Co.*, Fla., 47 So. Rep. 12.

7.—**Exceptions.**—Where a party excepts to the decision of a magistrate on certain points as opposed to the preponderance of the testimony, he by implication admits that there was some evidence to sustain the finding on those points.—*May v. Augusta & A. Ry. Co.*, S. C., 61 S. E. Rep. 1019.

8.—**Ex Parte Affidavit.**—To determine whether the amount in controversy was sufficient to give the trial court jurisdiction, the Supreme Court must examine the record and cannot consider ex parte affidavits filed in the appellate court.—*Gilbert Co. v. Husted*, Wash., 96 Pac. Rep. 835.

9.—**Harmless Error.**—On appeal the Supreme Court will not consider objections to the admission of evidence and to the modification of an instruction, where such admission and modification could not have affected the verdict.—*O. S. Richardson Fueling Co. v. Seymour*, Ill., 85 N. E. Rep. 496.

10.—**Appearance.**—Application for Change of Venue.—A defendant by appearing and filing an affidavit of prejudice to secure a change of venue held to have waived any defects in the service of summons or return.—*State v. Hilgendorf* Wis., 116 N. W. Rep. 848.

11.—**Attorney and Client.**—Authority to Collect Money.—A debtor is justified in paying the amount of the debt to one purporting to act as attorney for the client, where the creditor, on being communicated with by the debtor, informed such debtor that the matter was in the hands of the creditor's attorney.—*Kramer v. Grant*, 111 N. Y. Supp. 709.

12.—**Criticism of Courts.**—Criticism of the motives of judicial officers by an attorney in a proceeding other than for the removal of the officer criticised held misconduct.—*In re Rockmore*, 111 N. Y. Supp. 879.

13.—**Bailment.**—Negligence.—Where a bailee of goods, though liable to the owner for their loss only in case of negligence, falls upon demand to deliver them or account for nondelivery, he is prima facie negligent.—*Porter v. Duval Co.*, 111 N. Y. Supp. 825.

14.—**Bankruptcy.**—Claim for Rent.—Where property of a bankrupt, a part of which was subject to a landlord's lien and a part not, was sold together in gross, without objection, the proceeds cannot be apportioned so as to entitle the landlord to priority of payment from any part thereof.—*Vollmer v. McFadgen*, U. S. C. C. of App., Third Circuit, 161 Fed. Rep. 914.

15.—**Concealed Property.**—On the trial of a bankrupt charged with concealing property, proofs of claims filed against his estate, not shown to have been examined or approved by him, are not admissible to establish the amount of property bought by him prior to his bankruptcy.—*Jacobs v. United States*, U. S. C. C. of App., First Circuit, 161 Fed. Rep. 694.

16.—**Defense of Insanity.**—It is a defense to a petition in involuntary bankruptcy, which alleges as an act of bankruptcy that defendant conveyed property with intent to hinder, delay, and defraud his creditors, that the alleged bankrupt was insane at the time of such conveyance, and incapable of forming such intent.—*In re Ward*, U. S. D. C., D. N. J., 161 Fed. Rep. 755.

17.—**Discharge.**—Whether a judgment against one who is thereafter adjudged bankrupt is thereby discharged is properly raised by pleading a discharge in a proceeding to enforce the judgment, and not by petition to enjoin its execution.—*Hellman v. Goldstone*, U. S. C. C. of App., Third Circuit, 161 Fed. Rep. 913.

18.—**Exemptions.**—Under the personal property exemption law of North Carolina in case of bankruptcy, the bankrupt must select his exemption in kind, and cannot wait, until the property has been sold and claim the maximum value of his exemptions in money from the proceeds.—*In re Blanchard*, U. S. D. C., E. D. N. Car., 161 Fed. Rep. 793.

19.—**Fraudulent Conveyances.**—A bill by a trustee in bankruptcy to set aside, as fraudulent against creditors, gifts made by the bankrupt more than a year prior to the adjudication of bankruptcy, must allege and prove either that the debts of the creditors accrued prior to the making of the gifts, or that the gifts were made with a fraudulent intent.—*Cartwright v. West*, Ala., 47 So. Rep. 93.

20.—**Fraudulent Transfers.**—A federal District Court of another district than that in which a bankruptcy proceeding is pending may entertain a suit to set aside an alleged fraudulent transfer by the bankrupt to parties residing in the district.—*Teague v. Anderson Hardware Co.*, U. S. D. C., N. D. Ga., 161 Fed. Rep. 765.

21.—**Objections to Discharge.**—Exceptions to certain specifications of objections to the discharge of a bankrupt sustained on the ground that the averments therein were too vague and indefinite, but with leave to amend.—*In re Wittenberg*, U. S. D. C., E. D. Pa., 160 Fed. Rep. 991.

22.—**Partnership.**—In proceedings in bankruptcy against a partnership, the individual schedules of the partnership are not a part of the record, nor can they be considered as such.—*In re Blanchard & Howard*, U. S. D. C., E. D. N. Car., 161 Fed. Rep. 797.

23.—**Pleading Discharge.**—Where in assumption the declaration did not show the plaintiff's debt to have been provable in bankruptcy, a plea of discharge in bankruptcy not alleging that fact was defective.—*Currier v. King*, Vt., 69 Atl. Rep. 873.

24.—**Proceedings in Different Districts.**—Under General Orders in Bankruptcy No. 6 (32 C. C. A. v.), where petitions are filed against the same individual in different districts, the first hearing should be in the district in which he has had his domicile during the greater part of the preceding six months rather than in a district to which he subsequently removed, and in which he was domiciled when the petitions

were filed.—*In re Isaacson*, U. S. D. C., S. D. N. Y., 161 Fed. Rep. 777.

25.—**Proof of Claim.**—A petition for sale of collateral filed with a referee within the year following an adjudication in bankruptcy which fully set out the petitioner's claim against the bankrupt held to constitute a sufficient proof of claim, as amended after the expiration of such year by showing the credits realized from the sale of the collateral.—*In re Faulkner*, U. S. C. C. of App., Eighth Circuit, 161 Fed. Rep. 900.

26.—**Review.**—Under Court of Appeals Rule 38, a petition to review orders in bankruptcy must be filed within ten days after the entry of the order sought to be reviewed, unless the court within such time enlarges the time.—*In re Strobel*, U. S. C. C. of App., Second Circuit, 160 Fed. Rep. 916.

27.—**Time for Filing Claims.**—Under Bankr. Act, c. 541, Sec. 57n, a creditor who failed to prove his claim because of a statement in the bankrupt's schedules that the assets therein listed were of no value which statement was not fraudulent, cannot be permitted to prove the same after the expiration of the year when such assets turn out to be of value.—*In re Peck*, U. S. D. C., N. D. N. Y., 161 Fed. Rep. 762.

28. **Banks and Banking.**—**Payment on Forged Order.**—Where a bank makes payment on what purports to be a written order by him, which turns out to be a forgery, if it does not act in good faith and with reasonable care, it will be liable to pay again to the rightful owner of the deposit.—*Hough Ave. Savings & Banking Co. v. Anderson*, Ohio, 85 N. E. Rep. 498.

29.—**President a Trustee.**—A bank president is to be regarded as a trustee, bound to exercise such care and prudence in his office as men of common prudence ordinarily show in their own affairs; the measure of his care being dependent on the subject to which it is due and the circumstances of each particular case.—*Davenport v. Prentice*, 110 N. Y. Supp. 1056.

30. **Bills and Notes.**—**Consideration.**—Where a person becomes a bona fide holder for value of a bill of exchange before its acceptance, his right to enforce it against a subsequent acceptor held not to depend upon an additional consideration proceeding from him to the drawee.—*National Park Bank v. Salta*, 111 N. Y. Supp. 927.

31. **Brokers.**—**Compensation.**—A broker held not entitled to a commission for securing a verbal offer from a prospective purchaser, where such offer, though accepted by the principal, is not followed by a sale.—*Schliansky v. Hillman*, 111 N. Y. Supp. 696.

32. **Carriers.**—**Bill of Lading.**—Where plaintiff discounted a draft with a bill of lading attached in the ordinary course of business, before maturity, the drawee or acceptor could not plead want of consideration.—*Bank of Gunter-ville v. Jones Cotton Co.*, Ala., 46 So. Rep. 971.

33.—**Contract of Carriage.**—In a suit by passengers for breach of a contract of carriage, libelants held not entitled to recover damages for loss of time after the breach and while waiting for a trial of the case.—*The Stanley Dollar*, U. S. C. C. of App., Ninth Circuit, 160 Fed. Rep. 911.

34.—**Injunction to Restrain Enforcement of Rates.**—Where from the evidence it appears probable that railroad rates prescribed by a state on intrastate business will not afford to

the carriers a just or reasonable return on the property devoted to the service, but that such rates will be confiscatory, a federal court has discretionary power to grant a preliminary injunction restraining the enforcement of such rates pending a final hearing.—*Central of Georgia Ry. Co. v. Railroad Commission of Alabama*, U. S. C. C., W. D. Ala., 161 Fed. Rep. 925.

35.—**Who are Passengers.**—A section hand injured while riding back and forth to work on a car, without charge, pursuant to a rule of the company, is not a passenger, but is in the exercise of a mere privilege connected with his employment.—*Birmingham Ry., Light & Power Co. v. Sawyer*, Ala., 47 So. Rep. 67.

36. **Champerty and Maintenance.**—**Contract with Attorney.**—Where a contract for a contingent fee is champertous because providing that client shall not compromise the claim without the consent of the attorney, such illegal stipulation cannot be ignored and the other provisions enforced.—*Davy v. Fidelity & Casualty Ins. Co.*, Ohio, 85 N. E. Rep. 504.

37. **Constitutional Law.**—**Assessments for Public Improvements.**—Where law denies land-owners' right to object to assessment on ground that objections are cognizable only by board of equalization, something more than opportunity to submit in writing to the board objections to assessment is essential to satisfy due process of law guaranteed by Const. U. S. Amend. 14.—*Londoner v. City & County of Denver*, U. S. S. C., 28 Sup. Ct. Rep. 708.

38.—**Delegation of Power to Fix Railway Rates.**—The provision of St. Ala. Aug. 7, 1907, (Laws 1907, p. 711), authorizing the State Railroad Commission to change the established schedule of railroad rates in its discretion, held void as an attempt to delegate legislative power conferred solely on the legislature by section 243 of the state constitution.—*Central of Georgia Ry. Co. v. Railroad Commission of Alabama*, U. S. C. C., M. D. Ala., 161 Fed. Rep. 925.

39.—**Due Process of Law.**—Act May 2, 1889, (P. L. 66), held not to deprive heirs of decedent of property without due process of law because it fixes period of three years within which adjudication of escheat may be set aside.—*In re Alton's Estate*, Pa., 69 Atl. Rep. 902.

40.—**Obligation of Contract.**—An ordinance granting the right to a street railway company to run its cars on conditions stated, on its acceptance confers a right and thereafter the city council cannot lower the fare to be charged.—*Shreveport Traction Co. v. City of Shreveport*, La., 47 So. Rep. 40.

41. **Contempt.**—**Abatement.**—Where defendant was adjudged to pay a fine and to be committed until paid for contempt in violating a preliminary injunction, and sued out a writ of error and died before hearing, the proceedings for contempt were civil, and did not abate by his death.—*Wasserman v. United States*, U. S. C. C. of App., Eighth Circuit, 161 Fed. Rep. 722.

42. **Contracts.**—**Construction by Parties.**—When the construction to be given a contract is rendered doubtful by the language thereof, the interpretation which the parties have placed upon its words is entitled to great weight.—*Gibbes Machinery Co. v. Johnson*, S. C., 61 S. E. Rep. 1027.

43. **Copyrights.**—**Restrictions on Sale by Purchasers.**—The sole right to vend a copyrighted book, secured by Rev. St. U. S., Sec. 4952, to

the owner of the copyright, does not give a right to impose a limitation as to the price at which the book shall be sold by future purchasers.—*Bobbs-Merrill Co. v. Straus*, U. S. S. C., 28 Sup. Ct. Rep. 722.

44. **Corporations**—Conveyance of Real Estate.—A conveyance by persons in possession of land is ineffectual to vest a corporation's legal title thereto in the grantee, in the absence of authority from the corporation to convey, though the corporation is no longer in active operation.—*Dickinson v. Harris*, Ala., 47 So. Rep. 78.

45.—**Repudiation of Contract**.—Where a contract by a private corporation is not forbidden by law and has some relation to the business it is authorized to do, it may not be repudiated at pleasure.—*McQuaig v. Gulf Naval Stores Co.*, Fla., 47 So. Rep. 2.

46.—**Subscription to Stock**.—Where a son subscribed for stock in a corporation, the fact that his father furnished the money to pay for it did not give the father any privilege in respect to it, nor render him the owner of the stock.—*Von Schlemmer v. Keystone Life Ins. Co.*, Ia., 46 So. Rep. 991.

47. **Covenants**—Breach of Warranty.—Where the grantee in a warranty deed is sued on a covenant contained in a subsequent deed executed by him, notice to his grantor of the pendency of such action, not given until one day before that on which the case was to be tried, is insufficient.—*Morette v. Bostwick*, 111 N. Y. Supp. 1021.

48. **Criminal Evidence**—Confessions.—A witness by whom a confession is sought to be proved cannot testify that the confession was voluntary, as the question of its voluntary character is for the court.—*Jones v. State*, Ala., 47 So. Rep. 100.

49. **Criminal Trial**—Arraignment.—Though in an arraignment the indictment should be read in full, yet, if the formal concluding part, beginning "contrary to the form of the statute," etc., be not read, this will not vitiate a sentence pronounced on a plea of guilty.—*State v. Crane*, La., 46 So. Rep. 1009.

50.—**Former Jeopardy**.—Where an offense was committed both in Georgia and Florida, and was a transgression against the laws of both states, an acquittal or conviction in Georgia will not prevent a prosecution in Florida for the act in violation of the laws of that state.—*Strohar v. State*, Fla., 47 So. Rep. 4.

51. **Customs and Usages**—Legality.—A custom cannot be availed of to contravene an express rule of law or the provision of a statute.—*Wyatt v. Wanamaker*, 110 N. Y. Supp. 900.

52. **Damages**—Breach of Executory Contract.—One deprived of the profits of an executory contract may recover the difference between the contract price and the amount it would have cost him to perform the contract.—*Wieser v. Times Realty & Construction Co.*, 110 N. Y. Supp., 963.

53. **Death**—Persons Entitled to Sue.—An action for the death of a husband may be prosecuted in the name of the personal representative for the benefit of the widow and children.—*Archibald v. Lincoln County*, Wash., 96 Pac. Rep. 831.

54. **Deeds**—Undue Influence.—Where a person by undue influence and in consideration of his marriage with a woman obtained a conveyance

of her land to them as tenants by the entirety, held no defense to her action to annul the conveyance that the marriage could not be annulled in the action.—*Ring v. Ring*, 111 N. Y. Supp. 713.

55. **Druggists**—Liability to Persons Purchasing Drugs.—Where a druggist declared a drug to be fit for the purpose for which he sold it, his liability for injuries caused by reason of its inadaptability for that purpose held not affected by his failure to label it as fit for that purpose.—*Goldberg v. Hegeman & Co.*, 111 N. Y. Supp. 679.

56. **Eminent Domain**—Rights of Abutting Owners.—The easement of an abutting owner in a public street held private property, within the meaning of the constitution, of which he cannot be deprived without compensation.—*Gillender v. City of New York*, 111 N. Y. Supp. 1051.

57. **Equity**—Jurisdiction.—A court of equity is without jurisdiction to review or control, the action of the superior jury created by the Louisiana Purchase Exposition Company and vested with power to make final awards to exhibitors unless fraud, accident, or mistake is shown.—*Borden's Condensed Milk Co. v. Louisiana Purchase Exposition Co.*, U. S. C. C. of App., Eighth Circuit, 160 Fed. Rep. 919.

58. **Estoppel**—Claim to Property.—One who, having previously claimed to have a mortgage on personalty, notifies the buyer of it at a public sale that he claims a right to it, is not estopped to assert full title.—*Beck v. Lowell*, Kan., 95 Pac. Rep. 1131.

59.—**Subscription to Capital Stock**.—A stockholder in a suit against the corporation cannot complain of its failure to collect subscriptions to capital stock, when he himself is delinquent, and suit has been filed against him to compel payment, which suit he is contesting.—*Von Schlemmer v. Keystone Life Ins. Co.*, La., 46 So. Rep. 991.

60. **Evidence**—Admission by Employee.—Conversation between plaintiff and defendant's employee after the accident, claimed to have been caused by the employee's negligence, held not admissible against defendant.—*Callahan v. Keith & Proctor Amusement Co.*, 111 N. Y. Supp. 781.

61.—**Conditional Sales**.—A condition in a contract of conditional sale that the seller is not responsible for any promise other than is written or printed on the face of the contract does not render inadmissible a separate written contract entered into contemporaneously with the contract of sale.—*Gilbert Co. v. Husted*, Wash., 96 Pac. Rep. 835.

62.—**Judicial Notice**.—The federal Supreme Court will take judicial notice of the Spanish law as far as it affects the insular possessions of the United States.—*Municipality of Ponce v. Roman Catholic Apostolic Church in Porto Rico*, U. S. S. C., 28 Sup. Ct. Rep. 737.

63. **Federal Courts**—Appeal from Circuit Court.—A defendant on an appeal to Circuit Court of Appeals from a decree sustaining demurrer to bill for want of jurisdiction of a state court from which case was removed stands in no better position as to its right to appeal to Supreme Court from decree entered under direction of Circuit Court of Appeals than if it had itself appealed to that court.—*Kansas City Northwestern R. Co. v. Zimmerman*, U. S. S. C., 28 Sup. Ct. Rep. 730.

64.—**Federal Question**.—Whether a city coun-

cil has determined that board of public works has complied with conditions necessary to order a street improvement held not a federal question.—*Londoner v. City & County of Denver*, U. S. S. C., 28 Sup. Ct. Rep. 708.

65.—**Jurisdiction.**—Whether owners of copyright can have relief in equity, independent of statutory copyright, because of alleged conditional sale, is a question which the federal courts cannot consider where there is no claim of damages in the sum of \$2,000, and no diversity of citizenship.—*Scribner v. Straus*, U. S. S. C., 28 Sup. Ct. Rep. 735.

66.—**Forcible Entry and Detainer.**—Right of Plaintiff to Possession.—One who obtains possession of land as an employee or licensee of the owner cannot change the character of his possession by forming a partnership, and such partnership cannot maintain forcible entry and detainer on being ejected by the owner.—*Napier v. Spielmann*, 111 N. Y. Supp. 933.

67.—**Fraud.**—Knowledge of Falsity.—In an action for deceit, a complaint, which fails to allege that the representations were made by defendant with knowledge of their falsity and with the intent that plaintiff should act thereon, held demurrable.—*Colorado Springs Co. v. Wight*, Colo., 96 Pac. Rep. 820.

68.—**Game.**—Purpose of Game Law.—*Laws 1907, p. 81*, relating to the preservation of certain game, held intended for the preservation of the creatures enumerated in the act, and not, except as a mere incident, for the protection of lands against trespassers.—*Barclay v. State*, Ala., 47 So. Rep. 75.

69.—**Gaming.**—Sales for Future Delivery.—An executory agreement for the sale of goods is not invalid unless neither of the parties contemplated an actual delivery, and it was the intent of both parties that there should be a settlement based on the market value on the day for delivery.—*Stewart, Morehead & Co. v. Postal Telegraph-Cable Co.*, Ga., 61 S. E. Rep. 1045.

70.—**Gas.**—Franchises.—Trustees and majority of the stockholders of an existing gas company held to have power, in the absence of fraud or unfairness, to exchange its franchise for that of a new company.—*Theis v. Spokane Falls Gas-light Co.*, Wash., 95 Pac. Rep. 1074.

71.—**Use of Streets.**—An ordinance granting a gas company the privilege of using the streets and public places for laying of pipes and mains having been passed in accordance with the requirements of the city charter is valid.—*Morris v. Municipal Gas Co.*, La., 46 So. Rep. 1001.

72.—**Highways.**—Defects Causing Injury.—A highway consisting of a narrow fill in the center of which was a bridge, the floor of which was six inches above the level of the highway, held not reasonably safe for travel.—*Archibald v. Lincoln County*, Wash., 96 Pac. Rep. 831.

73.—**Holidays.**—Judicial Proceedings.—Const. art. 6, Sec. 5, held to leave the legislature at liberty to allow or disallow the transaction of all judicial business on legal holidays or non-judicial days.—*Diepenbrock v. Superior Court of Sacramento County*, Cal., 95 Pac. Rep. 1121.

74.—**Homicide.**—Evidence.—Where defendant was convicted of manslaughter, and the question as to who was the aggressor was not an issue in the case, testimony of threats made by deceased against the accused, though not communicated to him, should not have been admitted.—*State v. Peace*, La., 47 So. Rep. 28.

75.—**Malice.**—Whenever a homicide has been done deliberately or without adequate cause, the law presumes that it was done with malice, and the burden is on accused to show that it was not so done.—*State v. Underhill*, Del., 69 Atl. Rep. 880.

76.—**Injunction.**—Municipal Corporations.—A stage company cannot enjoin a city from interfering with its displaying advertisements of others on the exterior of its coaches, where it has no authority to use its coaches for advertising any other business than its own.—*Fifth Ave. Coach Co. v. City of New York*, 110 N. Y. Supp. 1037.

77.—**Judgment.**—Conformity to Pleadings and Issues.—Where seasonable objection is made and amendment is not asked for or allowed, a party cannot be permitted to recover on a wholly different cause of action than the one pleaded.—*Hayes v. American Bridge Co.*, 111 N. Y. Supp. 883.

78.—**Of Sister State.**—A decree after order of revivor against the administrator with will annexed of a nonresident who had died pending suit, confirming award and arbitration proceedings, held not to bind nonresident executors and legatees who did not appear and were not validly served.—*Brown v. Fletcher's Estate*, U. S. S. C., 28 Sup. Ct. Rep. 702.

79.—**Revival.**—The release of a judgment by the original judgment creditor held not to avail the judgment debtor after a revival of judgment by an alleged assignee of the original judgment creditor.—*La Fitte v. Salisbury*, Colo., 95 Pac. Rep. 1065.

80.—**Landlord and Tenant.**—Abandonment of Premises.—Where a roof which remained in the landlord's control leaked so as to deprive the tenant of the beneficial enjoyment of the premises, the tenant was justified in abandoning them.—*Valentine v. Woods*, 110 N. Y. Supp. 990.

81.—**Liability of Landlord.**—A person injured by falling into an open unguarded cellarway in a sidewalk fronting leased premises cannot recover from the lessor who was not in possession or control of the premises, on the theory of the maintenance of a nuisance, without a showing that the maintenance of the opening was in violation of some law or ordinance.—*Donovan v. Gillies Coffee Co.*, 111 N. Y. Supp. 707.

82.—**Life Insurance.**—Insurable Interest.—One has no insurable interest in the life of his brother-in-law, merely because of the existence of that relationship.—*Chandler v. Mutual Life & Industrial Assn. of Georgia*, Ga., 61 S. E. Rep. 1036.

83.—**Pleadings in Action on Policy.**—In an action on a policy of life insurance, the failure of plaintiff to formally furnish proof of death as required by the policy was not available to defendant under the general issue, but should have been specially pleaded.—*Manhattan Life Ins. Co. v. Verneuille*, Ala., 47 So. Rep. 72.

84.—**Limitation of Actions.**—Constructive Trusts.—Limitations run against a constructive trust, and the right to enforce it is barred after the expiration of ten years.—*Lady Ensley Coal, Iron & R. Co. v. Gordon*, Ala., 46 So. Rep. 983.

85.—**Foreclosure.**—An action to foreclose a mortgage held barred by the six-year statute where by the insolvency of the mortgagee the debt secured was not on the bond but for money had and received.—*Union Trust Co. v. Scott*, Ind., 85 N. E. Rep. 481.

86. **Logs and Logging—Standing Timber.**—The omission from a contract for the purchase of standing timber of any time within which the purchaser shall remove the timber does not rob the contract of mutuality of obligation, since such omission can be supplied by the courts.—*Shepherd v. David Bros. Lumber Co.*, La., 46 So. Rep. 999.

87. **Mandamus—State Board.**—A claimant against a state may maintain mandamus to compel the state board of examiners to allow a claim against the state, where the board has arbitrarily refused to allow the same on questions of law only.—*State v. Cutler*, Utah, 95 Pac. Rep. 1071.

88. **Marine Insurance—Construction of Policy.**—Where a marine policy provided that it should not cover more than \$100,000 by any one steamer, and insured suffered a loss of \$85,996.70 on a single shipment valued at \$349,426.70, the insurer was only liable for such proportion of the loss as \$100,000 bore to the value of the goods.—*Hood Rubber Co. v. Atlantic Mut. Ins. Co.*, U. S. C. C. S. D. N. Y., 161 Fed. Rep. 788.

89. **Master and Servant—Brakeman's Reliance on Telltales.**—A brakeman held entitled to rely on telltales to some extent to warn him of approach to a bridge.—*Harrison v. New York Cent. & H. R. R. Co.*, 111 N. Y. Supp. 812.

90. **Continuance of Employment.**—Where a servant hired at a fixed salary continues after the expiration of the term without any new contract, it is presumed that the parties intend the same compensation.—*Perry v. J. Noonan Furniture Co.*, Cal., 95 Pac. Rep. 1128.

91. **Employer's Duty.**—An employee must use his place of work and machinery furnished him carefully to avoid injury to himself, and, if injury results from the operation of machinery, the employer is not liable.—*United States Cement Co. v. Koch*, Ind., 85 N. E. Rep. 490.

92. **Injury to Servant.**—An employee of a street railroad company, riding on a car at the time of his injury by a collision, in addition to showing the collision and injury, must adduce some evidence tending to show negligence in order to recover.—*Birmingham Ry., Light & Power Co. v. Sawyer*, Ala., 47 So. Rep. 67.

93. **Mortgages—Foreclosure.**—The doctrine of putting one on notice cannot apply to a case where a particular trust deed under which a sale is made is referred to, which as recorded has on its face no pertinency to the actual sale, even if referred to by the proper deed book and page.—*Provine v. Thornton*, Miss., 46 So. Rep. 950.

94. **Mechanics Liens.**—An instrument, at most a trust deed in the nature of a mortgage for the benefit of creditors, is not valid as against subsequent mechanics' liens, and the lienors have preference in the surplus money.—*Hall v. Thomas*, 111 N. Y. Supp. 979.

95. **Right to Rely on Entire Mortgaged Premises.**—A mortgagee cannot be compelled to rely upon a portion of the mortgaged premises, even though it be ample security; and hence he is entitled to hold a homestead interest in the premises until the entire premises are redeemed.—*Davis v. Davis*, Vt., 69 Atl. Rep. 876.

96. **Municipal Corporations—Assessments for Improvements.**—An assessment for benefits by the commissioners of estimate and apportion-

ment is not conclusive, and, when brought under review by the court, facts must be presented to enable it to see that there was a basis for the assessment made.—*In re East 136th Street in City of New York*, 111 N. Y. Supp. 916.

97. **Bill to Abate Public Nuisance.**—Where a bill by municipality to abate a building alleged that the building in question was unsafe, the walls out of plumb, and that it was liable to fall at any time and was dangerous to passers-by, it showed a nuisance of a public nature.—*Pearson v. City of Birmingham*, Ala., 47 So. Rep. 80.

98. **Charter Officers.**—In order that a charter officer shall be entitled to compensation for his services, he must show that either the charter which created the office, or the authority under which the charter was framed, attached to that office the right to compensation.—*Woods v. Potter*, Cal., 95 Pac. Rep. 1125.

99. **Fiscal Management.**—While city authorities may transfer from its general fund moneys as temporary loans to other funds, they should not transfer to special funds that have not an assured source of income, the collection of which is under the control of the city itself, so as to imperil the general fund.—*Griffin v. City of Tacoma*, Wash., 95 Pac. Rep. 1107.

100. **Powers.**—A municipal corporation possesses the powers granted in express words, and those necessarily and fairly implied in or incidental to the express powers and those indispensable to the declared objects and purposes of the corporation.—*In re Village of Kenmore*, 110 N. Y. Supp. 1008.

101. **Sewer Improvements.**—A suit to restrain a city from levying and collecting an assessment for a sewer improvement, which has been completed, is a collateral attack on the proceedings of the city relating to the improvement and only defects affecting the jurisdiction are available.—*Menzie v. City of Greensburg*, Ind., 85 N. E. Rep. 484.

102. **Verification of Personal Injury Claims.**—A claim against a city for personal injury to a married woman being community property, its verification by the husband alone is sufficient.—*Matthews v. City of Spokane*, Wash., 96 Pac. Rep. 827.

103. **Navigable Waters—Evidence of Navigation.**—Acts 1864, p. 180, c. 97, declaring the Smoky Hill and other rivers not navigable, does not conclusively establish the fact that they were navigable before.—*Kregar v. Fogarty*, Kan., 96 Pac. Rep. 845.

104. **No Exeat—Grounds.**—Pending an appeal by a husband from a decree of divorce in favor of his wife, a writ of ne exeat restraining appellant from leaving the state without an order of the Supreme Court will not be granted in the absence of a sufficient showing that appellant is about, or threatening, to leave the jurisdiction, and where there is a stay bond, and a considerable portion of the property is real estate, title to which it would be difficult for him to pass without respondent's consent.—*Holcomb v. Holcomb*, Wash., 95 Pac. Rep. 1091.

105. **Negligence—Defective Appliances.**—Where plaintiff, the foreman of a switching crew, was injured in endeavoring to adjust an automatic coupler with his hand, it was no excuse for his failure to cross between the cars and use the lever that he considered it dangerous so to do.—*Union Pac. R. Co. v. Brady*,

U. S. C. C. of App., Eighth Circuit, 161 Fed. Rep. 719.

106.—**Degree of Care Required.**—The law of negligence is not based on the highest degree of care, nor even the degree of care which a highly prudent person would use, but on the average of reasonable care, the degree of care which twelve men selected at random will say is reasonable under the circumstances.—*Spannknebel v. New York Cent. & H. R. R. Co.*, 111 N. Y. Supp. 705.

107.—**Reasonable Care.**—The controlling test of ordinary care is what a reasonably prudent person would ordinarily have done in the like circumstances, rather than the prevailing practice of others engaged in the same business.—*Chicago Great Western Ry. Co. v. McDonough*, U. S. C. C. of App., Eighth Circuit, 161 Fed. Rep. 657.

108. **Nuisance—Navigable Waters.**—One who has been divested of his littoral rights cannot maintain a suit to enjoin an obstruction to his access to navigable waters in front of his land.—*McCloskey v. Pacific Coast Co.*, U. S. C. C. of App., Ninth Circuit, 160 Fed. Rep. 794.

109. **Officers—Compensation.**—The right of a public officer to compensation for the performance of duties imposed upon him by law does not rest upon contract, but is incident to the right to hold office, and, unless compensation is allowed by law, he is not entitled to payment as upon a quantum meruit.—*McGillie v. Corby*, Mont., 95 Pac. Rep. 1063.

110. **Parent and Child—Consent to Employment of Minor Son.**—Parent having impliedly consented to minor son's employment with knowledge of the work he was doing held to have thereby consented to the risk naturally incident to such work.—*Tennessee Coal, Iron & R. Co. v. Crotwell*, Ala., 47 So. Rep. 64.

111. **Patents—Effect of Nonuser.**—Nonuser of a patent for an improvement in paper bag machines to save the expense of altering the old machines will not justify equity in withholding injunctive relief against infringement.—*Continental Paper Bag Co. v. Eastern Paper Bag Co.*, U. S. S. C., 28 Sup. Ct. Rep. 748.

112. **Process—Exemptions.**—Nonresident witnesses and nonresident parties as witnesses are privileged from arrest or summons upon a civil process while in attendance upon, going to, and returning from the trial of a cause in the courts of this state.—*Martin v. Whitney*, N. H., 69 Atl. Rep. 888.

113. **Schools and School Districts—Powers of Board.**—It could not be assumed in determining the validity of a contract providing for plans and specifications for a school building to cost in excess of the amount appropriated that the authorities contemplated subsequent additional appropriations.—*Perkins v. Newark Board of Education*, U. S. C. C., D. N. J., 161 Fed. Rep. 767.

114. **Set-Off and Counterclaim.**—Parties to Cross-Demand.—Underwriters, in a suit on a wrecking company's contract for salvage services, held not entitled to prosecute a counterclaim for the owner's damages for the wrecking company's delay in floating the vessels in question, as trustees of an express trust for the owner.—*Klauck v. Federal Ins. Co.*, 111 N. Y. Supp. 1037.

115. **Street Railroads—Negligence.**—A street car motorman having opened the gate on the front platform, to admit passengers to the car,

held that it was his duty to keep the gate open until a passenger entering had had a fair opportunity to get into a position of safety.—*Stevenson v. Joline*, 111 N. Y. Supp. 698.

116.—**Regulations.**—Where the reasonableness of restriction imposed in granting a location to a street railway are questioned in an action, only the validity at the time they were originally imposed is to be considered.—*Murphy v. Worcester Consol. St. Ry. Co.*, Mass., 85 N. E. Rep. 507.

117. **Taxation—Valuation of Property.**—Where a citizen is aggrieved by an excessive valuation of his property, his remedy is by appeal to the county commissioners and the court of common pleas, not by a suit in equity.—*Clark v. Burschel*, Pa., 69 Atl. Rep. 900.

118.—**Liability of Collector.**—The Governor and Attorney General may, at any time before rendition of the decree, make the proper certificate, resulting in the remitting of the damages for the failure of a county tax collector to pay the state and county taxes collected by him.—*Adams v. Saunders*, Miss., 46 So. Rep. 960.

119. **Telegraphs and Telephones—Mental Anguish.**—Where a father started to the bedside of his sick son, the telegraph company's failure to deliver to him a subsequent message as to his son's condition held not to have proximately caused mental anguish.—*Western Union Telegraph Co. v. Leland*, Ala., 47 So. Rep. 62.

120. **Usury—Foreign Contracts.**—A lawful bond solvable by the laws of a foreign state, and not given in evasion of the usury laws of Kansas, will be enforced, though under the laws of the state the rate of interest was excessive.—*Steinman v. Midland Savings & Loan Co.*, Kan., 96 Pac. Rep. 860.

121. **Vendor and Purchaser—Bona Fide Purchasers.**—One who buys land subject to a recorded mortgage which does not definitely show when it will become due, nor the amount due thereon, and refers to a note from which the facts may be ascertained, is chargeable with notice of what might have been discovered by an examination of the note.—*Croasdale v. Hill*, Kan., 96 Pac. Rep. 37.

122. **Waters and Water Courses—Agreement as to Diversion.**—Where prior and subsequent appropriators of the waters of a stream have reached an agreement as to division, each will thereafter be estopped from denying the right of the other to divert the waters under the agreement.—*Saunders v. Robison*, Idaho, 95 Pac. Rep. 1057.

123. **Wills—Construction.**—A gift to the "legal issue" of testator's daughter after a life estate in her is a gift to her descendants, and is not limited to her children.—*Schmidt v. Jewett*, 111 N. Y. Supp. 680.

124. **Witnesses—Competency.**—The competency of a witness as affected by a former conviction must be determined alone from the record of the court in which the conviction was obtained.—*United States v. Sims*, U. S. C. C., N. D. Ala., 161 Fed. Rep. 1008.

125.—**Credibility.**—One accused of murder could show that a state's witness who saw the killing was intoxicated at the time to discredit his testimony as to what occurred, but could not show that he was intoxicated an hour and a half afterwards.—*Pollock v. State*, Wis., 116 N. W. Rep. 851.

Central Law Journal.

ST. LOUIS, MO., NOVEMBER 20, 1908

THE FUNCTION OF PLEADING IN A GOVERNMENT OF PROTECTION.

The Central Law Journal made some criticisms of the Chicago Municipal Court Act, relating to its procedure which appears to have been drafted by intellects who had nothing more in view than "justice between the parties" and what was "in furtherance of justice between them." This view was thought a narrow and mischievous view which would lead to disappointment. For our expressions the National Corporation Reporter called us to an accounting. Thereupon we asked this able and esteemed contemporary certain questions as to the uses and necessity of pleading in the due administration of the laws. On September 17th, ult., the Reporter proceeded to answer, not, however, without some forgetfulness and possibly a little facetiæ.

From the Reporter's response to our questions we are put to a disadvantage for the reason that its position is ambiguous and equivocal; for the question is, *can pleadings be dispensed with in a government of protection?* In other words, *are not pleadings a necessity in the due administration of justice? Are they not imperatively demanded for the public welfare from necessity, convenience, certainty and the economies of the judicial department?* To meet these views the Reporter defines pleadings as designed to serve only one purpose, and this is, namely: "*To apprise the adverse party of what he must meet.*" Beyond this the Reporter expressly and approvingly quotes a code provision which provides that a cause is commenced by *filing* the statement of a *cause of action*. It also emphasizes its approval of equity requirements for the constitution and operation of a record. Next the Reporter com-

mits itself to the view that pleadings may be dispensed with in all courts, as they are in justices' courts. No doubt it is meant if the court is organized as justices' courts are.

Now we wish to demur to the Reporter's views as to the function of pleadings being limited to apprise the respondent of what he must meet. We offer the view that appellate courts have a use for pleadings where they come to review a cause; also that pleadings are needed to resist objections upon collateral attack; also to show what subject-matter was litigated or what issues were decided in subsequent litigation between the parties; also to satisfy requirements of due process of law; also to enable the removal of *causes* from one court to another, as from state to federal courts; also for the operation of what is called the comity of courts; also for justification defenses of officers; also for the exercise of election of remedies; also for purposes of public policy; also for the operation of what is called constructive notice. And still there are other reasons. In perjury suits the materiality of the issue is sought. Now, where can or shall we look for this except in the pleadings? Views from either *res adjudicata* or constructive notice will show the position of the Central Law Journal on the one hand, and of the Reporter on the other.

The early Illinois authorities clearly stated the purpose of pleadings. In Shinn's Pleading, Vol. I., Sec. 478, the author declares the position of the Illinois courts on the object of pleading, to-wit: "The office of the declaration is to exhibit *upon the record* the ground of the plaintiff's cause of action, and the nature of this cause can only be determined by reference to the substance of the declaration." One of the established rules of law is to the effect that no valid judgment can be entered in an action without the filing of a declaration or complaint, or some written statement of plaintiff's *cause of action*, and demands. 23 Cyc. p. 695, citing authorities. In the case of Grimison v. Russell, 11 Nebr. 469, 9 N.

W. 647, it appeared that subsequent to trial, and while the case was under advisement by the court, all the pleadings were lost. It was held, on objection by defendant, that judgment could not be entered without substituted copies. If the only office of pleading is to "merely advise the adversary party of the state of facts which he will have to meet," why was it necessary after trial, and the evidence all in, to substitute a few lost pleadings before the court who had the case under advisement, could deliver itself of the judgment in the case? These reasons, so often departed from in these days by superficial judges and lawyers, are well stated by the court, and we have epitomized them in the fourth paragraph of this editorial.

Mr. W. T. Hughes, in his work on *Grounds and Rudiments of Law*, Section III, defines pleadings as the "juridical means of investing a court with jurisdiction of a subject matter to adjudicate it." The pleadings with the judgment are the solemn record in a cause which lose none of their importance even after the case is heard and determined. Such a record may affect personal or property rights of generations yet unborn, and no government guaranteeing protection to property or personal rights by "due process of law" could dispense with pleadings any more than they could dispense with courts of justice.

NOTES OF IMPORTANT DECISIONS

EVIDENCE—ADMISSIBILITY OF INTRODUCING IN EVIDENCE IN PROOF OF SEDUCTION THE CHILD BORN OF THE MERETRICIOUS UNION.—One of the disputed questions of the law of evidence is the admissibility of putting in evidence to prove seduction the child born of the unlawful intercourse between the parties to the litigation. The preponderance of recent authorities is in favor of the admissibility of such evidence. This is the decision of the Supreme Court of Oregon in the case of *Anderson v. Aupperle*, 95 Pac. 330, where during the course

of the trial, and while Viletha Thurman, the granddaughter of the plaintiff, was upon the witness stand in plaintiff's behalf, she was requested to bring forward the baby to which she had testified she had given birth, and of which the defendant was the father. The child, being then a little under three months of age, was offered and received in evidence for the inspection of the jury, over the objections of the defendant. It was strongly urged by defendant's counsel that it was error to expose, as an exhibit before the jury, a child less than three months of age for the alleged purpose of proving a resemblance to the defendant. The argument was that, "although a resemblance between the parties, properly proved, is some evidence upon the issue, but during the first few weeks or even months of a child's existence it has that peculiar immaturity of features which characterize it as an infant, and that it changes often and very much in looks and appearance during that period" (*Clark v. Bradstreet*, 80 Me. 454, 15 Atl. 56, 6 Am. St. Rep. 221), and that such evidence, when deduced from the exhibit of an immature child, "is too vague, uncertain, and fanciful a nature to be submitted to the consideration of a jury." *Hanawalt v. State*, 64 Wis. 84, 24 N. W. 489, 54 Am. Rep. 588.

There is a decided conflict of authorities upon the admissibility of such evidence, the adjudications ranging from a total exclusion thereof to an unqualified admission. The most able of the recent authorities is the opinion of Mr. Chief Justice Parsons in the case of *State v. Danforth*, 73 N. H. 215, 60 Atl. 839, 111 Am. St. Rep. 600, decided in 1905. After reviewing most of the cases on this point he says, at page 219 of 73 N. H., page 841 of 60 Atl. (111 Am. St. Rep. 600), of the opinion: "All the authorities concede, in effect, that there may be cases in which the maturity of the child, or the character of the peculiarities relied upon as a ground of resemblance or dissimilarity, render the child competent evidence on the issue of paternity. The objections urged to the competency of the evidence go rather to its weight than to its relevancy. When comparison is made to determine a difference of race or otherwise, greater weight may properly be given to the evidence, but the ground of its relevancy is the same as when the comparison is between individuals. The objection resting upon the immaturity of the child is merely to the definiteness of the proof. If all individuals developed by a fixed rule, it might be possible to fix upon a certain age below which the child should not be exhibited as evidence on this issue. If there were such an age, its scientific determination would involve the finding of a question of fact upon physiological evidence—

an investigation which this court has no means or power to make. Whether the features of a child are sufficiently developed to authorize its use as evidence by comparison with the alleged parent is purely a question of fact. A court of law cannot determine this question of fact as a rule of law without evidence, upon their personal impressions, without basing their judgment upon a 'vague, uncertain, and fanciful' foundation. Conceding that resemblance properly proved is an evidentiary fact competent for consideration in connection with other evidence upon the issue of paternity, and that in certain instances or situations the individuals themselves may furnish evidence of such resemblance, the question whether the evidence offered by one of the individuals—the child—is sufficiently definite to have weight on the question in a particular case is a question of remoteness determinable at the trial term. *Pritchard v. Austin*, 69 N. H. 367, 369, 46 Atl. 188; *Morrill v. Town of Warner*, 66 N. H. 572, 29 Atl. 412."

THE LAW IN ITS RELATION TO THE CHILD.

In everything that relates to the condition of infancy, or nonage, the common law affords a rare instance of complete harmony between legal doctrine and moral conceptions of right and justice. In no other class of cases is the determination so clearly referable to plain and fundamental principles, adherence to which will insure results in accordance with the real merits of the cause, as in those involving the care and guardianship of the person of infants. In an early case, that great oracle of the law, Lord Mansfield, laid down the doctrine, that when a child is brought up by *habeas corpus*, the court, in disposing of its custody, must judge in every instance "upon the circumstances of the particular case and give its directions accordingly."¹ This doctrine embraces the accepted principle of decision in the American cases. There is, there can be, no other "rule." Yet the courts have not always recognized this. Later English judges, departing from the principle of their great predecessor, formulated a system of rules under which they

held themselves bound to dispose of the fate of children brought before them with a rigid adherence to supposed technical requirements that signally defeated the ends of justice. Starting with the postulate that the custody of the child "belonged" to the father or other legal guardian and could not be taken from him unless "forfeited" by the grossest misconduct,² they rendered a series of decisions under which helpless infants were torn from the mothers' arms and delivered into the possession of dissolute men with the judicial calm and impartiality that would govern the transfer of a bale of cotton or a load of grain to the rightful owner suing in replevin.³ The law as thus declared and applied so shocked the moral sense of the people of England that it led to the passage of various statutes by Parliament, designed to remedy the supposed defective condition of the common law. At the present day the English judges are guided by broad, humane and just views in the determination of questions relating to the care and guardianship of infants.⁴ The comment of an American judge upon the legislation deemed necessary in England in order to enable the courts to decide justly and rightly is, that Parliament did little more than restore the law to its former proper footing.⁵

There are some early American cases in which the harsh doctrine of the now discredited English cases above referred to was followed.⁶ On the other hand, there is an array of decisions by our highest American courts, based on the common law, that may be regarded as absolutely settling the law on this subject in accordance with

(2) *Reg. v. Clark*, 7 E. & B. 186; *Re Hake-will*, 12 C. B. 223.

(3) *Rex v. DeManneville*, 5 E. 221; *Exp. Skinner*, 9 J. B. Moore, 278; *Exp. McClellan*, 1 Dowl. P. C. 81; *Rex v. Greenhill*, 4 Ad. & El. 624, 6 Nev. & M. 344.

(4) *Smart v. Smart*, 1892, App. Cas. 425; *Reg. v. Gyngal*, 1893, 2 Q. B. 232; *Re A. & B.*, 1897, 1 Ch. 786.

(5) *Gishwiller v. Dodez*, 4 O. St. 615, 622.

(6) *Re Kottman*, 2 Hill (S. C.), 363; *Exp. Williams*, 11 Rich. (S. C.), 452; *Hutson v. Townsend*, 6 Rich. Eq. (S. C.), 249; *Tarkington v. State*, 1 Ind. 171; *Moore v. Christian*, 56 Miss. 408; *Re Vetterlein*, 14 R. I. 378.

(1) *Rex v. Delaval*, 3 Burr. 1434.

the ruling of Lord Mansfield. There is no danger at this day that our judges would feel themselves constrained to do things of which, according to language credited to Chief Justice Denman, they could feel "ashamed."⁷ There could no longer be such a travesty of justice as a solemn judicial decree requiring an infant to be torn from the mother's arms and delivered into the possession of an outcast and his avowed mistress. Yet there is not wanting even at this late day judicial recognition of the legal *theory* that rendered such things possible and aroused the horror of a nation at the supposed barbarity of the law. It has been gravely stated that the law in cases affecting alleged claims to the person of children is "inexorable" and that the courts must decide according to certain general rules, "though the result be contrary to what they may consider as the real merits of the particular cause."⁸ Apart from any other consideration, the fact that such a dictum can come from so high a source as that here referred to would seem amply to justify a restatement of the rule laid down by the great English judge in collocation with the underlying principles governing the law of infancy and guardianship from which it is logically deduced. A great wave of fervid interest on the subject of the duty of society and the state to the child has of late years swept over the nation, quickening the public conscience and rendering the discussion of the topic in all its aspects one of universal, living concern.

The doctrine first concisely stated by Lord Mansfield has been otherwise expressed to the effect, that in matters affecting the determination of questions relating to the custody of infants there can be no legal standard by which the courts must be governed; the custody cannot be awarded according to any fixed and inflexible rules, as in cases where property rights are concerned.⁹ From the very nature of the questions involved, the judgment must be essentially a discretionary judgment, one absolutely incapable

of being brought under legal rules and definitions.¹⁰ This does not mean, that in these cases the courts are cast upon a sea of doubt, without chart or compass. Great as is the variety of questions here arising, they are all susceptible of solution by reference to certain fundamental doctrines extending through the entire law and comprehending every proposition on the subject.¹¹

At the foundation of the whole law in this regard lies the common-law conception of the legal status of the child. Under the ancient Roman law the family was regarded as the legal unit of society. The identity of the child was merged in that of the family and the control of the father (*patria potestas*) was closely assimilated to that of master over slave.¹² Our law, the product of an essentially different system of government and civilization from that of Rome, in times of paganism, deals with the individual as the unit of society. The doctrine of the common law is, that from the very moment of birth a child becomes a citizen, or subject, of the government under whose jurisdiction born, entitled to the protection of that government.¹³ In the case of adults, or persons who have attained the full age of legal capacity, the exercise of this protection is of comparatively limited scope, being largely restricted to redress of actual injuries to the citizen in violation of his legal rights. In the case of infants, or persons under the natural and legal disability of nonage, the government exercises functions of guardianship and superintendence flowing from its general power and duty as *parens patriae*, or sovereign guardian. No doctrine has been asserted more broadly in principle than that of the authority of government in this regard and none has received more extensive and varied practical application. The numerous regulations to be found upon the statute books of the states, designed for the protection of the morals and health of minors and the secur-

(7) *Gishwiler v. Dodez*, *supra*.

(8) *Newsome v. Bunch*, 144 N. C. 15.

(9) *Re Blackburn*, 41 Mo. App. 622, 628.

(10) *Smart v. Smart*, *supra*.

(11) Cf. *Bishop Non-Contr. L.*, §§ 48, 53.

(12) 8 Harv. L. Rev. 39.

(13) *Re Moore*, 11 Ir. C. L. N. S. 1, 14; *Re Connor*, 16 Ib. 112, 124; *McKercher v. Green*, 13 Col. App. 270.

ity of their person, have been sustained as valid enactments in the exercise of this governmental power. Such are provisions prohibiting the sale of liquor to minors, with or without the parental consent;¹⁴ those regulating the kinds of employment¹⁵ and hours of labor¹⁶ of minors; those prohibiting their admission to certain places, *e. g.*, drinking saloons.¹⁷ So also, it is held, that statutes may authorize the detention of minors duly convicted of crime in special juvenile prisons or reformatories¹⁸ and that, whenever such course is necessary for their moral and future welfare, the commitment of minors to houses of refuge and other juvenile asylums and institutions may be authorized by summary proceeding.¹⁹ The validity of such legislation is now universally upheld. The reasoning adopted in the cases on this subject has been followed in another line of decisions in which the validity of recent statutes establishing juvenile courts for the trial and commitment of juvenile delinquents and dependent children is fully sustained.²⁰ In the case of the commitment of minors to juvenile institutions upon summary process, without the ordinary forms of accusation and trial, it is held that no right of the child is violated, the object of the proceeding being, not punishment, but care and guardianship. Rights of third persons—parents, guardians—cannot be said to be violated, because the fundamental idea upon which the entire legal conception of guardianship rests is, that it is a mere agency or instrumentality of government for the purpose of according to infants the protection of its laws. The legal

status of every guardian, natural as well as specially appointed, is that of a trustee.²¹ No such thing as a "vested right" is recognized in this connection.²²

It has accordingly, from the earliest times, been held, that the chancery courts may exercise a general care and wardship over infants and regulate the conduct of all guardians, however created or appointed, removing or superseding them, if deemed proper, and holding them fully accountable as trustees.²³ The jurisdiction in such cases is plenary and far-reaching. The infant on whose behalf in any form of proceeding the aid of chancery is invoked becomes, by the very fact of the application or pendency of the proceeding, until the attainment of full age, a ward of the court and may be governed and protected accordingly, and no act can be done affecting the person or property of such infant except under the express or implied direction of the court itself. In the adjudication of the matter of custody, the courts of equity take into consideration all the circumstances and render their decision on principles of justice and natural equity.²⁴ From the peculiar constitution of these courts the jurisdiction exercised by them in relation to infants naturally differs from that exercised by courts of law in the particular of its much broader scope. Here, however, the difference ends. The distinction between the remedy by bill or petition in equity and the proceeding by *habeas corpus* in cases affecting infants is solely a matter of form and procedure.

The principles that underlie the action of the two classes of tribunals in these cases are the same. Under an extension of the strict scope of the remedy by *habeas corpus*, the common-law courts exercise jurisdiction in the case of infants held in private custody

(14) *State v. Clottu*, 33 Ind. 409; *State v. Lawrence*, 97 N. C. 492.

(15) *People v. Ewer*, 141 N. Y. 129; *Re Weber*, 149 Cal. 392; *re Spencer*, *Id.* 396.

(16) *State v. Shorey*, 48 Or. 396.

(17) *People v. Japinga*, 115 Mich. 222.

(18) *State v. Phillips*, 73 Minn. 77.

(19) *Exp. Crouse*, 4 Whart. 9; *Wisconsin School v. Clark County*, 103 Wis. 651; *State v. Home Society*, 10 N. Dak. 493; *House of Refuge v. Ryan*, 37 O. St. 197; *Exp. Nicolls*, 110 Cal. 651; *Jarrard v. State*, 116 Ind. 98; *McLean v. Humphreys*, 104 Ill. 378.

(20) *Hunt v. Circuit Judges*, 142 Mich. 93; *Mill v. Brown*, 31 Utah. 473; *Re Christensen (Utah)*, 62 Cent. L. J. 219; *Robison v. Circuit Judges*, 151 Mich. 325.

(21) *Wellesley v. Wellesley*, 2 Bligh N. S. 124, 128; *Striplin v. Ware*, 36 Ala. 87; *Shine v. Brown*, 20 Ga. 375.

(22) *U. S. v. Green*, 3 Mason, 482, Fed. Cas. 15,256; *Nugent v. Powell*, 4 Wyom. 173.

(23) *Cowls v. Cowls*, 8 Ill. 435; *North Pacific Board v. Ah Won*, 14 Or. 339; *State v. Grisby*, 48 Ark. 406; *Re Knowack*, 158 N. Y. 482; *Re Stittgen*, 110 Wis. 625; *Jenkins v. Whyte*, 62 Md. 427, 432; *Norris v. Baumgardner*, 97 Ib. 534; *Richards v. Railway Co.*, 106 Ga. 614.

(24) *Cowls v. Cowls*, *supra*.

or restraint.²⁵ The writ is the means of bringing the infant before the court, the powers of the court in its subsequent proceedings being referable to the general jurisdiction over infants.²⁶ As in equity, so at law, the government acts through the remedy invoked as *parens patriae*. It has accordingly been held throughout the United States, that when infants are brought up by *habeas corpus*, the decision must be upon the merits of the particular cause and that the welfare of the infant is the paramount consideration in each case to which all other considerations must yield.²⁷ While, in a general sense, the custody of the parent or guardian is ordinarily deemed the proper one, yet this must never be asserted as a legal right or claim, the only strict right or claim recognized in these cases being that of the child to be in that custody or charge which will subserve its real interests.²⁸ So firmly is this principle established that even where there is a statutory provision, that the parents, if not unfit, shall be entitled to the custody, it is yet held, that the courts, taking the statute as a general guide, must look to the circumstances of each particular case and give special attention to the best interests of the child.²⁹ As wardship must never be converted into virtual imprisonment, the further doctrine obtains, that the court, guarding only against an injurious custody, will consult and respect the child's own wishes as to its proper disposal, if it is capable of making

the choice for itself. This capacity, according to the best considered cases, is to be ascertained, not by reference to any particular age, but by the child's actual intelligence and judgment.³⁰

The power of the courts in all these cases is a fully discretionary one to do what the welfare of the child requires to be done—a power to be freely and liberally exercised, so as to promote the real objects of the law, without regard to ordinary technicalities of procedure.³¹ Such is the well-established law, resting not in mere theory, but guiding and controlling the actual practice and judgments of our courts. Hence, it is the constant practice of the courts both of law and equity to ignore any supposed superior claims arising out of mere guardianship. As between parents, the custody of younger children and female children of all ages is ordinarily confided to the mother.³² In cases of very young children this may be done even though she is immoral and a decree has been passed against her for adultery.³³ Children of a near age are ordinarily kept together.³⁴ On *habeas corpus* as well as in equity, the courts may not only refuse to restore the custody to the legal guardian, when he is out of possession, but may remove the child when produced in his possession.³⁵ It is not at all necessary that the actual "unfitness" of the parent or other legal guardian should appear, in order to warrant a refusal to give the child into his custody. It is now well settled, that when a child has for any length of time been in

(25) *Wilmot's Notes*, 92-93; *Re Barry*, 42 Fed. R. 113, 136 U. S. 537.

(26) *Re Barry*, *supra*; *New York Foundling Hosp. v. Gatti*, 203 U. S. 429.

(27) *Merceln v. People*, 25 Wend. 64; *Merritt v. Swimley*, 82 Va. 433; *Anderson v. Young*, 54 S. C. 388; *Gishwiler v. Dodez*, *supra*; *Corrie v. Corrie*, 42 Mich. 509; *Bulleck v. Robertson*, 160 Ind. 521; *McKercher v. Green*, *supra*; *Stickel v. Stickel*, 18 App. D. C. 149; *Coulter v. Syphert*, 78 Ark. 193; *New York Foundling Hosp. v. Norton*, 9 Ariz. 105; *State v. Poindexter*, 45 Wash. 37.

(28) *Wadleigh v. Newhall*, 136 Fed. 941; *Nugent v. Powell*, *supra*; *Tytler v. Tytler*, 15 Wyom. 319.

(29) *Sturtevant v. State*, 15 Neb. 459, 463; *Jones v. Darnall*, 103 Ind. 569; *Bryan v. Lyon*, 104 Ib. 227; *Sheers v. Stein*, 75 Wis. 44, 51; *Lally v. FitzHenry*, 85 Iowa, 49; *State v. Greenwood*, 84 Minn. 203; *Tytler v. Tytler*, *supra*.

(30) *Re Lyons*, 22 L. T. N. S. 770; *State v. Bratton*, 15 Am. L. Reg. N. S. 359, 363; *Woodruff v. Conley*, 50 Ala. 304; *Roberts v. Walker*, 18 Ga. 5; *Maples v. Maples*, 49 Miss. 393; *Tytler v. Tytler*, *supra*.

(31) *Gishwiler v. Dodez*, *supra*; *Corrie v. Corrie*, *supra*; *Cowls v. Cowls*, *supra*; *Dumain v. Gwynne*, 10 Allen. 270; *State v. Poindexter*, *supra*.

(32) *Hawkins v. Hawkins*, 65 Md. 104, 112; *Re Delano*, 37 Mo. App. 185; *People v. Hickey*, 86 Ill. App. 220.

(33) *Comm. v. Addicks*, 5 Binney, 520; *Dalley v. Dalley*, *Wright* (Ohio), 514; *Haskell v. Haskell*, 152 Mass. 16.

(34) *Comm. v. Addicks*, 2 S. & R. 174; *English v. English*, 32 N. J. Eq. 738; *Lusk v. Lusk*, 28 Mo. 91; *Tytler v. Tytler*, *supra*.

(35) *State v. King*, 1 Ga. Dec. 93; *Re Hansen*, 1 Edm. Sel. Cas. 9.

the custody of a stranger or third person, the courts will not make a change, unless it clearly appears, that the interests and welfare of the child necessitate such change.³⁶ In addition to the interests of the child itself, due consideration is always given to the person with whom the child may have been placed,³⁷ so that, even where a child is too young or has been in its adoptive home too short a while to be itself affected in feeling by a separation, the feelings and interests of the person who has undertaken its care must not be disregarded.³⁸ *A fortiori*, in a case where through the act or sufferance of the strict legal custodian the custody has come to be in a third party, the courts will not, at the instance of a parent or guardian, interpose to restore it to him, thus breaking up ties that the child was allowed to form, if the change appears actually disadvantageous.³⁹ The policy of the law indeed favors the placing of children in suitable homes among strangers, whenever the natural guardians are unable or unwilling properly to care for them. Upon this ground it is now held, that contracts to adopt children, or to leave them a legacy in consideration of the relinquishment of their custody to the promisor, may be enforced both at law and in equity.⁴⁰

The principles underlying the decision in the class of cases above referred to, directly involving questions of the custody and care of the person, are of general application in the determination of controversies or proceedings affecting the interests of infants. Whether the guardianship is directly involved or not, the judgment must be in harmony with these principles. Thus, while it is a doctrine of the strict common law, that the father is entitled to the services and earnings of his minor child, yet if he

fails in his paternal duty of maintenance and care, this is deemed a relinquishment of any such claim.⁴¹ So it is uniformly held, that a father in insolvent circumstances, while continuing in the fulfillment of all the duties of the paternal relation, may yet voluntarily relinquish the claim to the child's earnings in order to prevent his creditors from levying upon the fruits of the child's industry.⁴² It is also held, that while a father may, at common law, bind out his infant son for the purpose of learning some useful trade or employment, he cannot bind him as a mere servant, nor can he assign the child's services for a consideration to enure to himself.⁴³

The solicitude of the law in guarding and protecting the interests of children appears in the most various directions. It extends, among other things, to the prohibition and prevention of acts and contrivances to place children beyond the reach of legal remedies. The writ of injunction is applicable to prevent any person but of possession, though he be the parent or other legal custodian, from possessing himself of the person of a child by means of force or violence, or other indirect or illegal means.⁴⁴ The use of force or violence in such cases may likewise be remedied as a civil trespass,⁴⁵ or punished criminally.⁴⁶ Courts have also in some instances restored children to persons from whom they had been removed by means of stratagem or violence, in order that no undue advantage might be

(36) *Chapsky v. Wood*, 26 Kans. 650; *People v. Porter*, 23 Ill. App. 196; *Stringfellow v. Somerville*, 95 Va. 701; *Anderson v. Young*, supra.

(37) *Re Murphy*, 12 How. Pr. 518.

(38) *Green v. Campbell*, 35 W. Va. 698.

(39) *U. S. v. Sauvage*, 91 Fed. R. 490; *Legate v. Legate*, 87 Tex. 248; *Merritt v. Swimley*, supra; *Sheers v. Stein*, supra; *Re Gates*, 95 Cal. 461; *Spears v. Snell*, 74 N. C. 210.

(40) *Godine v. Kidd*, 64 Hun. 585; *Winne v. Winne*, 166 N. Y. 263; *Enders v. Enders*, 164 Pa. St. 266; *Healey v. Simpson*, 113 Mo. 340.

(41) *The Etna*, 1 Ware, 462, Fed. Cas. 4,542; *Thompson v. Railway*, 104 Fed. R. 845; *Canovar v. Cooper*, 3 Barb. 115; *McCarthy v. Railroad*, 148 Mass. 550; *Nugent v. Powell*, supra.

(42) *McDaniel v. Parrish*, 4 App. D. C. 213; *Dierker v. Hess*, 54 Mo. 246; *Atwood v. Holcomb*, 39 Conn. 270; *Trapnell v. Conklyn*, 37 W. Va. 242, 254; *Flynn v. Balsley*, 35 Or. 268; *Bristol v. Railway Co.*, 128 Iowa. 479.

(43) *Resp v. Keppele*, 2 Dall. 197; *Nickerson v. Easton*, 12 Pick. 110.

(44) *Re Lyons*, supra; *Armitage v. Hoyle*, 2 How. Pr. N. S. 438; *Ellis v. Jessup*, 11 Bush (Ky.), 403.

(45) *DeManneville v. DeManneville*, 10 Ves. 52, 62.

(46) *Comm. v. Coffey*, 121 Mass. 66; *State v. Farrar*, 41 N. H. 53; *State v. Rhoades*, 29 Wash. 61; *Re Peck*, 66 Kan. 692.

taken in this manner.⁴⁷ In accordance with the same policy, the courts refuse to entertain actions to recover damages for the mere possession or taking away of a child from the parent or guardian.⁴⁸ While an action, nominally for loss of services, may in some instances be maintained, this is a remedy of limited scope,⁴⁹ properly designed to afford redress where the gist of complaint is of an actual wrong or injury to the child. Even in cases where third parties, without direct warrant of law or express authority, have procured children to leave parents or guardians, there is no liability to a suit, if the action was prompted by humane or otherwise innocent motives.⁵⁰

Such in outline is the policy of the common law in relation to the child, a policy founded essentially in ethical conceptions of right and justice. This policy has indeed not always been maintained in the actual judicial administration of justice. Harsh sacrifices of the best interests of children have at times been made by courts and judges in obedience to the supposed demands of a fancied "inexorable law" that they felt bound to administer. Yet it is now established to the point of demonstration, that this wresting of judgment was due to "judicial misconception," leading the courts in reality to violate the law they seemed to serve. This discarded error has borne its full fruit of evil and should not be resurrected. No judge administering the common law need ever feel himself constrained to render a judgment affecting the interests of a child which as a man he must deplore. Without anxious misgiving that any legal rule will be infringed, courts may in all such cases follow the highest dictates of humanity and yield to the full demands of actual justice—for upon these the whole law in this regard is firmly based.

LEWIS HOCHHEIMER.

Baltimore, Md.

(47) *Rex v. Mosely*, 5 E. 224, n.; *Comm. v. Fee*, 6 S. & R. 255; *Janes v. Cleghorn*, 54 Ga. 9.

(48) *Dowling v. Todd*, 26 Mo. 267; *Rising v. Dodge*, 2 Duer, 42, 48.

(49) *Kenney v. Railroad*, 101 Md. 490.

(50) *Nash v. Douglass*, 12 Abb. Pr. N. S. 187; *Baumgartner v. Eigenbrot*, 100 Md. 508. Cf. *Reg. v. Tinkler*, 1 F. & F. 513.

INJUNCTION—TO PREVENT INTERFERENCE WITH RIGHT TO HUNT OR FISH.

AINSWORTH v. MUNOSKONG HUNTING & FISHING CLUB.

Supreme Court of Michigan, June 27, 1908.

Complainants' right to hunt ducks on the navigable waters of the state is not a bare legal right, interference with which causes no substantial injury, but is a right of sufficient dignity to move a court of equity to protect it by injunction.

McALVAY, J.: Complainants, residents of the county of Chippewa, filed their bill of complaint against defendant, praying that defendant be enjoined from interfering with, preventing, and molesting complainants in the pursuit of their common right to hunt wild fowl on Munoskong Bay in said county, whose waters, as is claimed in said bill, are a part of the Great Lakes; the defendant claiming to have exclusive right to take such wild fowl.

The material matters set forth in the bill of complaint necessary to state are: That the waters referred to are navigable meandered waters; that they were hunting ducks on said waters in a rowboat about one-half mile from shore, and had set their decoys for that purpose; that the agents and servants of defendant corporation came from the club-house and ordered complainants to cease hunting ducks, claiming the exclusive right to hunt ducks on said waters to be in defendant, and that complainants had no right or privilege to do so; that the agents and servants of defendant willfully and with intent to prevent complainants from hunting ducks upon these waters rowed their boat about among the decoys and prevented ducks from alighting near them, and prevented complainants from shooting and securing them; that complainants moved their decoys from that place to another upon the navigable waters of this bay, where they might lawfully hunt ducks; that these parties followed them, repeating their unlawful conduct and, acting under orders of defendant, again prevented complainants from hunting; that they followed complainants about with their boat, and finally they were unlawfully compelled to cease from exercising their lawful right to hunt on this navigable meandered bay; that defendant's servants, when requested to keep away and desist from interfering with them, refused, and said they were gamekeepers of defendant, which had employed and placed them there to prevent any persons except members of the club from hunting on said waters, which right was possessed solely and exclu-

sively by defendant—which conduct complainants allege is in violation of their inalienable rights in the pursuit of happiness and also of their personal liberty. Complainants allege that defendant club owns certain land on the border of this bay, upon which land is a clubhouse where these gamekeepers remain for the purpose of keeping hunters from these waters, and that defendant claims that by reason of such ownership it has the exclusive right to hunt on said waters; that defendant through its members, has publicly stated and advertised the fact that they will prohibit and prevent all persons, including complainants, at all times from hunting upon these waters.

The bill avers: That this bay is navigable by large steam and sail craft; that the ownership of defendant extends only to high or low water mark, at which point the fee of the State of Michigan begins; that they have a right at all times when the law so allows to hunt upon said waters in common with all citizens of the state; and that the lands covered by the waters of said bay beyond the meandered line thereof are unsurveyed, and none of them are owned or possessed by defendant, but belong in fee to the State of Michigan, held by the state as trustee for all of the people of the state, and complainants have as much right to hunt upon these waters as the members of defendant club. The bill also states that complainants desire and intend to hunt on said bay during the then approaching open season of 1907, but will be prevented from doing so by defendant's servants and agents, unless they are enjoined from interfering with them to the irreparable loss and injury of each of them, all of which is alleged to be contrary to equity and the rights of complainants and to their manifest wrong and injury. The bill alleges jurisdiction, and contains all the usual and necessary formal parts of a bill in chancery, and prays that defendant and its members, agents, etc., be restrained and enjoined from interfering with, obstructing, and preventing, in any manner, complainants from the free exercise of their right to hunt wild fowl upon said waters.

A preliminary injunction issued upon filing the usual bond in the sum of \$500. A motion for dissolution of this injunction was denied. Defendants then demurred to the bill of complaint upon the following grounds: "(1), Complainants have not, in and by their said bill, made or stated such a cause as entitled them in a court of equity to any discovery or relief from or against this defendant, touching the matters contained in the said bill or in any of such matters. (2), It appears by the said bill of complaint that, if complainants have any cause of action relative to the matters set forth in said bill of complaint, they have an

adequate remedy at law. (3), It appears by said bill of complaint that the rights affected of complainants, if any, are to their persons and not to their property. (4), That said bill of complaint fails to show any immediate danger of irreparable damage. (5), That complainants have been guilty of such laches that they are now barred and estopped from asking relief. (6), That complainants seek to restrain others from doing acts and things they have a legal right to do. (7), That the allegations in said bill of complaint are insufficient to give the court jurisdiction to grant the relief prayed for." Upon a hearing a decree was granted sustaining the demurrer and dismissing the bill of complaint. Complainants have appealed.

The demurrer admits the truth of the facts charged in the bill of complaint. At this time, then, there is no necessity for discussing complainants' rights in the premises, and we assume that the waters upon which they were attempting to pursue, hunt, and capture wild fowl were navigable waters, where they were entitled to exercise all the rights they claim. We may also assume that the hired servants of defendant wrongfully and unlawfully, under the instructions of their employer, the defendant, by the means stated, interfered with complainants in the peaceable enjoyment of their rights, under the claim that defendant had acquired exclusive rights and privileges for its members to hunt wild fowl upon these waters, and that such interference will continue to the damage and injury of complainants. The only proposition to consider is whether the bill sets forth such a cause of action over which a court of equity will entertain jurisdiction, and whether the bill of complaint states facts and circumstances sufficient to entitle complainants to an injunction against defendant. It will be unnecessary to cite and discuss text-writers and authorities as to the fundamental principles which govern courts in issuing or denying relief by injunction. The first question in an injunction case, in addition to the general question on the threshold of every chancery case relative to jurisdiction, is as to the necessity for the restraining writ of the court. This is determined by ascertaining the nature of the injury done or threatened. This is strictly an injunction bill, and to deny an injunction, preliminary or permanent, disposes of the whole case.

If hunting for wild fowl upon these navigable waters for recreation or health is a right which the complainants are entitled to exercise, no person may lawfully interfere with the reasonable and lawful exercise of that right. If it is urged that trespass will lie against defendant and its officers and agents for the wrong complained of, the petition

and continuance of the interference with complainants would require a multiplicity of suits, and, if complainants must be relegated to such suits, they certainly would be absolutely deprived of the exercise of a legal and substantial right, and the damages possible to be obtained would be wholly inadequate. Parties in such cases should be entitled to equitable relief. *Nashville, C. & St. L. Ry. v. McConnell* (C. C.), 82 Fed. 65. The right upon which complainants insist is a civil right, and their protection in its exercise clearly within equitable jurisdiction. 22 Cyc. 757. We think that this right is not merely a bare legal right, and interference with it causes no substantial injury. To many people such rights are highly prized, and their exercise valuable and necessary. To hold that such rights are not of sufficient dignity that interference therewith, and the prevention of their lawful exercise, and threatened continuance of such interference, will be taken cognizance of by the courts, and injury arising therefrom prevented, would be to deprive complainants of such rights and to encourage wrongdoers in the assumption of the sovereign prerogative. The allegations of the bill of complaint as to the apprehended injury threatened by defendant are sufficient. The averments of the bill not being denied are sufficient if charged on information and belief. *High on Injunction*, § 35. From the state of the pleadings there is no dispute here as to complainants' rights. Whether there is an injury for which a suit at law will furnish no adequate remedy, and whether that injury is irreparable are the crucial questions. The first we have decided in the affirmative. Whether an injury to property or rights is irreparable depends in each case upon the nature of the right or property. "An injury, to be irreparable, need not be such as to render its repair physically impossible; but it is irreparable when it cannot be adequately compensated in damages or when there exists no certain pecuniary standard for the measurement of damages * * * due to the nature of the right or property injured." 22 Cyc. 763, 764, and cases cited. The right to fish in navigable waters is a public right. 13 Am. Ency. 560, and cases cited. An action for damages will lie for injury to such right. 13 Am. & E. Enc. 584. The authorities hold that certain injuries to fishing, which, if permitted, would be irreparable, or for which the law furnishes no adequate remedy, may be restrained by injunction. 13 Am. & E. Enc. 585 and notes. To hunt and fish in and upon the navigable waters such as these is a public right of which any citizen may avail himself, subject to the game laws of the state. The right to hunt is as valuable to the individual as his right to fish, and the

authorities which sustain and protect him in the exercise of the one may be invoked with equal force as to the other. We are unable to draw any distinction between them.

Our conclusion is that the injury to complainants' rights complained of comes within this definition.

The decree of the circuit court sustaining the demurrer and dismissing the bill is reversed, with costs of both courts to complainants. The cause will be remanded, and defendant allowed the time fixed by rule to answer said bill of complaint.

NOTE.—Extent of the Public Right to Hunt and to Fish.—With the population of the country growing denser, rights hitherto unquestioned or undisputed, such as the right to hunt and fish on the public domain, become in danger of impairment. They must, of course, be necessarily restricted, but cannot be absolutely denied.

Right to Fish.—Fish in streams and all public waters are *ferae naturae*, and, as far as any right of property in them can exist it is in the public, or is common to all until they are taken and reduced to actual possession. *Percy Summer Club v. Welch*, 66 N. H. 180; *Lincoln v. Davis*, 53 Mich. 375. 51 Am. Rep. 116; *Gentile v. State*, 29 Ind. 409; *Parker v. People*, 101 Ill. 581. Therefore, the right of fishing in the navigable and public waters is free to the citizens of the state. *State v. Glenn*, 52 N. C. 321; *Hooker v. Cummings*, 20 Johns. (N. Y.) 90, 11 Am. Dec. 249; *Preble v. Brown*, 47 Me. 284; *Dunham v. Lamphere*, 69 Mass. 268. This right of fishery in the navigable waters of the state is an incident of sovereignty and cannot be bartered away. *Martin v. Waddell*, 18 N. J. L. 496; *Gough v. Bell*, 21 N. J. Law, 156; *Carson v. Blazer*, 2 Bin. (Pa.) 475, 4 Am. Dec. 463; *Sloan v. Biemiller*, 34 Oh. St. 492; *Skinner v. Hettrick*, 73 N. Car. 53; *Wilson v. Inloes*, 6 Gill (Md.) 121. See recent case of *State v. Gerbing* (Fla.), 67 Cent. L. J. 179, where the court holds that the state cannot grant an exclusive right to plant oysters on navigable waters. The right of fishing in navigable waters is subordinate to the right of navigation (*Lewis v. Keeling*, 46 N. Car. 299, 62 Am. Dec. 168), but is paramount to the private right to cut grass below high water mark (*Allen v. Allen*, 19 R. I. 114, 32 Atl. 166, 30 L. R. A. 497), or the right to cut ice. *Rowell v. Doyle*, 131 Mass. 474. This right, however does not include the right to land fish on private property above high water mark (*Bickel v. Polk*), 5 Har. Del., 325, or to place weirs or obstructions on adjoining flats, or to erect a hut on private lands adjoining the fishery, (*Cortelyou v. Van Brundt*, 2 Johns. (N. Y.) 357, 3 Am. Dec. 439) or to set nets or seines, making them fast in the usual way by grapplings to the shores, those being advantages which the riparian owner has over all others. *Duncan v. Sylvester*, 24 Me. 482, 41 Am. Dec. 400.

No right to exclusive fishing privileges in public waters can be obtained by adverse possession. *Chalker v. Dickenson*, 1 Conn. 382, 6 Am. Dec. 250; *Sloan v. Biemiller*, 34 Oh. St. 492; *Moulton v. Libbey*, 37 Me. 472, 59 Am. Dec. 57.

Thus, a custom among the inhabitants on a certain river that when anyone had cleared a place for seine fishing, he might hold it against everyone else, is not a good custom, being in derogation of common right. *Freary v. Cooke*, 14 Mass. 488; *Westfall v. Van Anker*, 12 Johns. (N. Y.) 425. But see *Trustees of Brookhaven v. Strong*, 60 N. Y. 56; *Collins v. Beubury*, 27 N. C. 118.

In *Sollers v. Sollers*, 77 Md. 148, 26 Atl. 188, 39 Am. St. Rep. 404, 20 L. R. A. 94, it was held that where, in trespass, it appeared that the fish were taken in a cove covered by water, within the ebb and flow of the tide, being confined within the cove by a wire fence extending across its mouth, a requested prayer that the verdict must be for the plaintiff was properly rejected, even though plaintiff had caught and placed some of the fish within the cove, as the fish, though confined, were in the tide waters.

Right to Shoot Game.—As with fish, so with wild animals (*ferae naturae*) known as game, the ownership is in the state for the benefit of all the people in common. *Geer v. State*, 161 U. S. 519, 16 Sup. Ct. 600; *Magner v. People*, 97 Ill. 320.

Comparatively few authorities have passed on the right to hunt on the public domain or the liability for interference with such right. In *Carrington v. Taylor*, 11 East. 571, it was held that the firing at wild fowl by one who was at the time in a boat on a public river where the tide ebbed and flowed, so near an ancient decoy as to make the birds there take flight, was evidence of willful disturbance and of damage to the decoy for which an action on the case might be maintained by the owner. See also *Keble v. Hickeringill*, 11 Mod. 74, 130, 11 East 574.

JETSAM AND FLOTSAM.

UNQUALIFIED BACHELORS.

In these days of connubial recklessness and uncertainty it is difficult to determine the question of whether a man is married or single wholly from outward circumstances. For which reason we can excuse the attorney who drew up the following affidavit now on file on page 379, Record B, in the recorder of deeds' office, in the city of Wichita, Kansas, to which our attention has been called through the courtesy of our esteemed correspondent, Mr. E. L. Foulke.

State of Kansas,
Sedgewick County—ss.

R. P. Murdock being duly sworn says that the firm of Gilbert Brothers, was composed of A. W. Gilbert, D. W. Gilbert and Charles F. Gilbert; that Henry Gilbert and Mary, his wife, were the parents of A. W. and Charles F. Gilbert; that Charles F. Gilbert was June 14, 1871, a single man; that D. W. Gilbert died in California a single man; that A. W. Gilbert was a single man and further deponent sayeth that A. W. Gilbert, D. W. Gilbert and Charles F. Gilbert were never married and were not married June 14, 1871, or since that time; that they were bachelors; that A. W. Gilbert was

single; that D. W. Gilbert was single; and that Charles F. Gilbert was single; that each and all were single June 14, 1871, before that time and since that time; that they were individually and collectively, absolutely and unqualifiedly bachelors.

R. P. MURDOCK.

Subscribed and sworn to, etc.

CORRESPONDENCE.

THE ANONYMOUS COMMENTARY ON LITTLETON.

When Mr. Hargrave was preparing his edition of Coke Littleton he found a MS. commentary on Littleton (Harleian MS. No. 1621.) He paid for copying it £12 10s. 4d. In 1829 Henry Cary published it, its date and the name of its author are unknown. It is a book showing great learning and having a style comparable with that of Blackstone. It seems strange that a book of such excellence and involving so much labor was not published by its author.

To me, for the following reasons, it seems probable that the book was written in 1624 by Sir John Davies.

On page 112 we read: "But if a forcible entry or a forcible detainer shall be made upon a lessee for years, whether the justice of the peace may make restriction and let them into their possessions again, is much questioned." As there could be no such question after the enactment of 21 Jac. I. c. 15 on forcible entry, this page must have been written before that statute was enacted; while page 467 which refers to the statute of limitation (21 Jac. I. c. 16) must have been written after that statute was enacted. The parliament 21 Jac. met in February 1624, and did not sit as late as the fall of 1624.

The preface (page XIV) shows that no commentary on Littleton had appeared. On the same page it is said: "And the king in his preface to his meditation upon the Lord's Prayer, doth remember that the author of that book titled 'The Trial', wisheth every man to abstain from writing any book when past fifty, which is a good caveat for myself." As the king (James I) died in March, 1625, and as Davies was born in 1570 my conjecture as to date and author is somewhat confirmed. Sir John Davies is the only man known to me of that period who possessed such learning and such style. Some pages of the remarks headed Littleton and prefixed to the commentary are taken from (and credited to) the preface to Sir John Davies' reports, throughout the commentary, the references to Sir John Davies' reports are quaint. Thus on page 34 at the end of a sentence translated from the report there is added. Sir John Davies' report, 34 a Nota Litt and on page 95 after a citation from those reports it is said: Read the book.

Sir John Davies was found dead in his bed December 8, 1626, by reason of apoplexy; within two years Coke Littleton had appeared and this rendered any other commentary superfluous.

The most interesting thing about the anonymous commentary is the fact that the author used indiscriminately two editions of 7 Coke differently paged and two editions of 8 Coke differently paged. Citations of Coke reports have long been confusing because of the different paging of these two books in different

editions. If we call the paging of the Thomas and Fraser edition (of 1826) A, and that of the Wilson edition (of 1793) B, it will be found that 7 Coke part 2 begins with folio 1 in A, but in B the numbering of 7 Coke is continuous; and two pages in B correspond to one page in A, both in 7 Coke and 8 Coke. Thus Englefield's case is cited as 7 Coke 13 and 7 Coke 82. It is evident that Cary used a B edition of 7 Coke, but the author of the commentary used A and B indiscriminately. In Wilson's edition of 1793 the paging of which is B the table of cases and analytical index throughout correspond to A. Stephen in his dictionary of biography tells us that about 1624 there was an edition of 5, 7 and 8 Coke. The first part of each of these three books consists of a single case reported not in law French, but in English or in English and Latin. This was evidently done to reach a class of readers familiar (not with French) but with English or Latin, that is, the clergy; just as the last case of Sir John Davies' reports (case of *praemunire*) is in English. It is possible that the page may have been reduced in size to make the books easier to handle.

There is considerable legal learning in the commentary not to be found in Coke, as, for instance the statement that tenancy by the curtesy does not stretch into the Isle of Wight, though that be made parcel of the county of Southampton.

No doubt had it been thought that Sir John Davies wrote the commentary it would have been more highly prized.

C. B. SEYMOUR.

Louisville, Ky.

BOOK REVIEWS.

MOORE ON FACTS.

One of the most singular of legal treatises is one just prepared by Charles C. Moore, on the subject of Facts or the Weight and Value of Evidence.

Jeremy Bentham said that "the causes of trustworthiness and untrustworthiness in evidence will probably without much difficulty be acknowledged to be an interesting pursuit; interesting not merely as a field of speculation, but with a view to practice." The author of Moore on Facts has certainly given the profession a very interesting introduction to this important "field of speculation;" and, we believe, in spite of our misgivings when we first commenced our examination of this treatise, that the author has contributed something of considerable value by his researches into this new and wholly unexplained field.

It is true that much of this work is philosophical and a considerable number of the questions discussed are of academic interest only, having often very little relation to actual practice in the courts. It is no objection to a legal treatise that the author goes back to the great philosophers and thinkers of past ages for fundamental and axiomatic truths upon which to build the superstructure of a work designed to blaze a new path through the labyrinthine jungles of a multitude of unsystematized rules and maxims.

The author's purpose succinctly expressed is to correlate those rules of practice which determine for courts and juries the credibility of a witness or his testimony. "Physicists inform us," says the author, "that conductivities vary with varying temperatures, tension, torsion, or pressure, and they have carefully observed and recorded the various degrees of resistance. In like manner, wise triers of facts have recorded the results of judicial experiments, whereby the mind's conductivity of truth has been tested for the varying mental, moral, and physical conditions operating upon the observation or testimony of witnesses." And this is what the author has done for the entire profession. He has gathered at the expense of exhaustive research and immense toil, the opinions of judges and jurists on what their experiences have shown of the workings of the human mind on the witness stand under varying conditions and has arranged these rules accessibly and with what logic and symmetry of which such a subject would permit.

To give an idea of the wide scope of this treatise, there are long and exhaustive chapters on, "Observation," and "Memory," two subjects rarely treated in the ordinary text book on evidence. The 260-page Chapter on Memory collates over two thousand citations of judicial discussions of the faculty of memory from every conceivable standpoint. Not more than twenty of these cases, the author informs us, were ever cited before to the same propositions in any accessible text book or digest. We might mention a few other interesting chapter themes of this treatise as follows: "Degree of Proof"; "Uncontradicted Testimony"; "Incredibilities and Improbabilities"; "Sound and Hearing"; "Light and Sight"; "Taste, Smell, and Touch"; "Distance"; "Speed"; "The Weather," etc.

Printed in two volumes in 1612 pages and published in two volumes by Edward Thompson Company, Northport, N. Y.

BOOKS RECEIVED.

Grounds and Rudiments of Law. By William T. Hughes, Author of "Contracts," "Procedure," and "Datum Posts of Jurisprudence." Volume II. Chicago. Published by The Usona Book Co. 1908. Price \$4.50. Review will follow.

HUMOR OF THE LAW.

Judge Romulus M. Saunders, an angler and wag of the first water, told many different stories about the weight of a big catfish he had caught. A friend, trying to entrap him, said: "Judge what was the weight of that big fish you caught?"

The judge, turning to his colored waiter, said:

"Bob, what did I say yesterday that catfish weighed?"

"What time yesterday, boss—in de mawning, at dinner time, or after supper?"

WEEKLY DIGEST.

Weekly Digest of ALL Current Opinions of
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1. **Action—Joinder of Causes.**—A cause of action for cancellation of a release of damages for personal injuries and a cause of action for damages for such injuries may be joined in the same petition.—*Perry v. M. O'Neill & Co.*, Ohio, 85 N. E. Rep. 41.

2. **Aliens—Presumptions.**—A person of Mongolian race coming from China is presumed to be an alien, and to rebut this presumption convincing evidence of citizenship is essential.—*Ex parte Lung Wing Wun*, U. S. D. C., N. D. Wash., 161 Fed. Rep. 211.

3. **Animals—Stock Law Election.**—A stock law election not held under Act 1900, p. 170, and annulled before the second was ordered within a year, held no bar to the second under section 3 (page 172) of that act.—*Thornton v. Bramlett*, Ala., 46 So. Rep. 577.

4. **Appeal and Error—Devolutive Appeal.**—A person to whom a devolutive appeal is granted in which the return day is fixed must not only file the transcript within the time fixed, but must also file the appeal bond within that time.—*Tell v. Senac*, La., 46 So. Rep. 618.

5. **Dismissal.**—It is not ground for the dismissal of an appeal from an order making an allowance to an executor's attorney that the appellate court could grant appellants no relief.—*In re Riviere's Estate*, Cal., 96 Pac. Rep. 16.

6. **Matters Not Presented Below.**—Reasons in support of a motion to direct a verdict which were not brought to the attention of the trial court will not be considered on appeal.—*Yetter v. Gloucester Ferry Co.*, N. J., 69 Atl. Rep. 1079.

7. **Use in Evidence.**—Admission of letterpress copies of letters held not prejudicial error for failure to give proper notice to produce the originals.—*Burton v. Frank A. Selfert Plastic Relief Co.*, Va., 61 S. E. Rep. 933.

8. **Assault and Battery—Evidence.**—In a prosecution for assault with intent to do great bodily injury with a gun, proof that the gun was not loaded would be material on the question whether the accused intended to inflict an injury.—*State v. Mitchell*, Iowa, 116 N. W. Rep. 808.

9. **Bail—Excessiveness.**—Where petitioner was indicted for bribery, an order fixing bail at \$10,000 on each charge, except as to certain reindictments, on which bail was fixed at \$5,000 on each charge, was not excessive, except as to the reindictments, on which only nominal bail should have been required.—*Ex parte Ruef*, Cal., 96 Pac. Rep. 24.

10. **Liability of Surety.**—Where a person signed as surety a bail bond, and it was accepted by the sheriff, the surety cannot avoid liability to the full extent of the bond because of agreement with the sheriff that his liability would be limited to a lesser amount.—*Snowden v. State*, Tex., 110 S. W. Rep. 442.

11. **Bankruptcy—Claims.**—The United States District Court held to have properly ordered in a bankruptcy proceeding that a creditor bank might account with the trustee for bonds of the bankrupt by delivering to the trustee notes of equal amount "made" or "indorsed" by bankrupt and discounted by the bank.—*In re Waterloo Organ Co.*, U. S. C. C. of App., Second Circuit, 159 Fed. Rep. 426.

12. **Enforcement of Attorney's Lien.**—A court of bankruptcy will not, by a restraining order, interfere with the carrying into effect of a valid order of a state court based on a finding that attorneys for a bankrupt are entitled to a lien on a judgment recovered for him prior to the bankruptcy.—*In re Pennell*, U. S. D. C., D. N. J., 159 Fed. Rep. 500.

13. **Estoppel to Deny.**—A bankrupt's wife held estopped to question the referee's jurisdiction to examine into her claim of title to personally held to have vested in the trustee.—*In re Bacon*, U. S. C. C. of App., Second Circuit, 159 Fed. Rep. 424.

14. **Jurisdiction of Federal Court.**—Where the property of a bankrupt resident of Georgia had been reduced to money in bankruptcy proceedings in the federal court sitting in that state, such court had jurisdiction to direct an allowance from the proceeds of the property sufficient to furnish him with household and kitchen furniture and provisions exempted under Const. Ga. art. 9, §§ 3-5.—*In re Hargraves*, U. S. D. C., S. D. Ga., 160 Fed. Rep. 758.

15. **Liens.**—An adjudication in bankruptcy pending an attachment against the bankrupt operated as a seizure of the property by the bankruptcy court, so that, on appointment and qualification of a trustee, he acquired title and right to possession until the court awarded the property to whomsoever it belonged.—*In re Walsh Bros.*, U. S. D. C., N. D. Iowa, 159 Fed. Rep. 560.

16. **Persons Subject to Adjudication.**—A corporation engaged in operating a restaurant held not subject to a bankruptcy adjudication, under Bankr. Act, c. 541, authorizing an adjudication against corporations engaged in "manufacturing."—*In re Wentworth Lunch Co.*, U. S. C. C. of App., Second Circuit, 159 Fed. Rep. 413.

17. **Replevin.**—Where a seller of property to a bankrupt brought replevin before the fil-

ing of a bankruptcy petition, claiming that the goods had been purchased through the bankrupt's fraud, the bankruptcy court had no jurisdiction to order the sheriff to surrender the goods to a receiver in bankruptcy, under Bankr. Act.—In re L. Rudnick & Co., U. S. C. C. of App., Second Circuit, 160 Fed. Rep. 903.

18.—Partnership.—Under Bankr. Act, c 541, §§ 5a, 5c, 30 Stat. 547 (U. S. Comp. St. 1901, p. 3424), where a firm was insolvent, on dissolution, the duty devolved on the retiring member, as well as other members of the firm, to release a levy on firm property, a failure to do which justified a bankruptcy adjudication against the firm and its members, including the retiring partner.—Holmes v. Baker & Hamilton, U. S. C. C. of App., Ninth Circuit, 160 Fed. Rep. 922.

19.—Trustee's Accounts.—Summary order to a bankruptcy trustee to pay into the registry all moneys received by him as receiver in an action in a state court held improper.—Loveless v. Southern Grocer Co. U. S. C. C. of App., Fifth Circuit, 159 Fed. Rep. 415.

20. Banks and Banking — Surrender of Shares.—A stockholder in a national bank having elected to withdraw, that she retained her certificates pending an appraisal of the bank's assets, and that subsequent dividends were credited to her on her refusal to receive them, held immaterial.—Apsey v. Whittemore, Mass., 85 N. E. Rep. 91.

21. Bills and Notes.—Accommodation Paper.—Where notes were indorsed as an accommodation and accepted by the payee to secure a debt, the notes are not taken out of the category of ordinary commercial paper.—Bank of Morgan City v. Herwig, La., 46 So. Rep. 611.

22. Bridges.—Duty of Counties.—Counties and townships owe the same duty towards bridges on free macadam roads, respecting repairs, etc., that they owe towards other highway bridges.—American Steel Dredge Works v. Board of Com'rs of Putnam County, Ind., 85 N. E. Rep. 1.

23. Brokers.—Compensation.—Where an owner puts his property into the hands of several real estate agents, the agent who first procures a purchaser is entitled to the commission.—Hennings v. Parsons, Va., 61 S. E. Rep. 866.

24.—Services After Termination of Contract.—Where real estate agents have failed to procure a purchaser within the time limited in their contract of employment, the owner held liable only for the value of services, not exceeding the contract price, performed in obtaining a purchaser after expiration of the contract.—Stewart v. Roberts, Ky., 110 S. W. Rep. 340.

25. Cancellation of Instruments.—Mistake of Law.—A husband who deeded land to his wife under the mistaken impression that he would inherit her property in case she died childless held not entitled to a cancellation of the deed because of his mistake as to the law.—Powe v. Culver, Conn., 69 Atl. Rep. 1050.

26. Carriers.—Carriage of Passenger.—In an action for the death of a passenger while riding on a caboose car, decedent held guilty of gross negligence in riding on top of the car.—McLean v. Atlantic Coast Line R. Co., S. C., 61 S. E. Rep. 900.

27.—Limitation of Liability.—The omission of a carrier to make inquiry as to the value of goods received is not a waiver of the provision in the contract limiting the liability to a speci-

fied sum.—Feld v. Platt, 110 N. Y. Supp. 1118.

28. Chattel Mortgage.—Replevin.—In replevin by mortgagee of live stock and the increase thereof against an attaching creditor to recover possession of the increase, the burden is on mortgagee to establish that such increase was conceived before the mortgage was given.—Holt v. Lucas, Kan., 96 Pac. Rep. 30.

29. Constitutional Law.—Foreign Corporations.—Foreign corporations, being within the state merely on sufferance, cannot complain of the procedure adopted by the state to determine the question whether their rights have been forfeited.—State v. Standard Oil Co., of Kentucky, Tenn., 110 S. W. Rep. 565.

30.—Liberty to Contract.—Laws Nev. 1903, p. 207, c. 111, § 1, prohibiting employers from contracting with employees that they shall or shall not become or continue members of a labor organization, is unconstitutional and void, as depriving parties affected of the liberty to contract.—Goldfield Consol. Mines Co. v. Goldfield Miners' Union No. 220, U. S. C. C., D. Nev., 159 Fed. Rep. 500.

31.—Right to Raise Constitutional Questions.—An alien has no right to require the courts of the United States to adjudicate questions as to the constitutionality of laws enacted by Congress.—Ex parte Lum Wing Wun, U. S. D. C., W. D. Wash., 161 Fed. Rep. 211.

32. Contracts — Right to Recant.—Where both parties intended that a building contract should be in writing and the contractor submitted plans, with a contract in writing signed by himself, and the owner never signed the instrument, the contract was incomplete.—Barrell v. Wehrli, La., 46 So. Rep. 620.

33. Convicts.—Conveyances.—A sentence to the penitentiary for a term of years does not make void a conveyance executed by the convict before his imprisonment, and while execution of the judgment of conviction is stayed under Sess. Laws 1903, p. 504, c. 389, pending appeal.—Harmon v. Bower, Kan., 96 Pac. Rep. 61.

34. Corporations.—Mortgage of Assets to Pay for Stock.—Persons purchasing the capital stock of a corporation have no power to mortgage the assets of the company to pay their individual debt for the stock.—Hess v. Reick, N. J., 69 Atl. Rep. 1090.

35. Corporations.—Ultra Vires Contracts.—The purpose of a grant of corporate power is that the corporation shall exercise its powers and carry on its business through its own officers and agents, and an agreement by which it surrenders the management and control of its affairs and business to another corporation organized for a wholly different purpose and carrying on a different business is ultra vires.—Holt v. California Development Co., U. S. C. C. of App., Ninth Circuit, 161 Fed. Rep. 3.

36. Creditors' Suit.—Validity of Judgment.—The rule that a third person may impeach a judgment when it is sought to be used to his detriment does not apply where it is only sought to compel payment from money alleged to equitably belong to the judgment debtor.—Feldier v. Bartleson, U. S. C. C. of App., Ninth Circuit, 161 Fed. Rep. 30.

37. Criminal Evidence.—Judgment of Conviction.—A judgment of conviction by a justice of

the peace who has no final jurisdiction being void, no appellate jurisdiction can be given to the city court by an appeal therefrom.—*Martin v. State, Ala.*, 47 So. Rep. 104.

38. **Criminal Law—Effect of Probation.**—An offender placed on probation on objecting to further continuance held not entitled to complain if he was thereupon discharged, but was entitled to appeal if sentence was imposed.—*Marks v. Wentworth, Mass.*, 85 N. E. Rep. 81.

39. **Pleadings.**—Judgment will not be arrested because it was alleged in the complaint that defendant kept a place where intoxicating liquors "were and are" sold, and where persons "were and are" permitted to resort for the purpose of drinking.—*City of Ft. Scott v. Dunkerton, Kan.*, 96 Pac. Rep. 50.

40. **Criminal Trial—Constitutional Questions.**—Where the record shows that accused moved in arrest of judgment, on the ground that the statute on which the prosecution was based was unconstitutional, the court will consider that question, though it is not shown that the trial court acted on the motion.—*State v. Davis, La.*, 46 So. Rep. 673.

41. **Failure to Allow Continuance.**—Discretion of court was not exceeded by compelling accused to go to trial where the case had been postponed several times, and nothing had been heard from the counsel for the defendant.—*State v. Clay, La.*, 46 So. Rep. 616.

42. **Damages—Breach of Contract.**—At common law the breach of a contract is per se a legal injury from which some damage will be inferred, and, in the absence of proof of actual damage, plaintiff is entitled to nominal damages.—*Van Scholck v. Van Scholck, N. J.*, 69 Atl. Rep. 1080.

43. **Descent and Distribution—Conveyances.**—On the death of a vendor, before conveyance his heir takes the title in trust for the vendee, but the purchase money when paid, goes to the vendor's personal representative.—*Flomerfelt v. Siglin, Ala.*, 47 So. Rep. 106.

44. **Dower—Lien.**—Creditors of an estate are entitled to be represented in the allotment of dower, or the ascertaining of a sum in lieu thereof, unless there are no debts, or there is sufficient, personal property to pay the same.—*Flomerfelt v. Siglin, Ala.*, 47 So. Rep. 106.

45. **Drain—Parties to Drainage Proceedings.**—A political subdivision having the ownership or quasi ownership of a bridge or highway affected by the establishment of a public drain held a necessary party to the drainage proceedings.—*American Steel Dredge Works v. Board of Com'rs of Putnam County, Ind.*, 85 N. E. Rep. 1.

46. **Embracery—Attempt to Corrupt Juror.**—An offer to bring a juror certain trade held a promise of a gratuity, within the meaning of Cr. Code 1902, § 263, providing punishment for attempting to corrupt jurors.—*State v. Maddox, S. C.*, 61 S. E. Rep. 964.

47. **Eminent Domain—Closing of Alleys.**—On the closing of an alley, the abutting owners are entitled to the difference in the market value of the property with the alley open and its market value with the alley closed.—*Henderson v. City of Lexington, Ky.*, 111 S. W. Rep. 318.

48. **Evidence—Best and Secondary.**—The question of reasonable notice to produce original letters to make letterpress copies admissible

is a relative one, and, in the absence of statutory requirement, depends upon the circumstances of each case.—*Burton v. Frank A. Selfert Plastic Relief Co., Va.*, 61 S. E. Rep. 933.

49. **Mortality Tables.**—A mortality table printed in a law book is not admissible in evidence, where it is not shown to have been in actual use or to have acquired a reputation for accuracy.—*Notto v. Atlantic City R. Co., N. J.*, 69 Atl. Rep. 968.

50. **Executors and Administrators—Equitable Conversion.**—Where a widow, who was also administratrix, sued in both capacities to enforce an equitable conversion, her further claim to dower out of the proceeds was an antagonistic position requiring the appointment of an administrator ad litem for the estate under Civ. Code 1896, § 352.—*Flomerfelt v. Siglin, Ala.*, 47 So. Rep. 106.

51. **False Pretenses—Elements of Offense.**—If in obtaining a loan from a bank the borrower secured it upon a forged signature on a note, a fraud is practiced on the bank, and the person obtaining the loan is liable for a prosecution for obtaining money under false pretenses.—*Day v. Commonwealth, Ky.*, 110 S. W. Rep. 417.

52. **Federal Courts—Jurisdiction.**—Whether a non-resident is entitled to maintain an action for wrongful death under a state statute is a question which goes to the defense of such an action, and does not affect the jurisdiction of a federal court therein.—*Pennsylvania v. Scofield, U. S. C. C. of App., Third Circuit*, 161 Fed. Rep. 911.

53. **Fire Insurance—Authority to Waive.**—If the company's agent was more than a mere soliciting agent in issuing the policy, and had further powers, knowledge of the agent that insured kept no iron safe or books, as required by the policy, was knowledge by the company, though the agent did not communicate such facts to the company.—*Plunkett v. Piedmont Mut. Ins. Co., S. C.*, 61 S. E. Rep. 893.

54. **Fish—Riparian Rights.**—An owner or claimant of lands in Alaska which border on navigable waters, having no right to the shore lands, has no exclusive right of fishing in such waters, nor to erect and maintain a fish trap either on the shore between high and low water mark, or in the adjacent deep waters to the exclusion of others.—*Columbia Canning Co. v. Hampton, U. S. C. C. of App., Ninth Circuit*, 167 Fed. Rep. 60.

55. **Fraudulent Conveyances—Fraudulent Interest.**—To set aside gifts as fraudulent against creditors at the time of the gift, it is not necessary to show that the gifts were made with a fraudulent intent, but, to set aside gifts as fraudulent against subsequent creditors, it is necessary to show a fraudulent intent.—*Cartwright v. West, Ala.*, 47 So. Rep. 93.

56. **Garnishment—Amendment of Return.**—Any amendment of the return of service of a garnishment summons which makes it speak the truth may be made, and it relates back to the date of service.—*Southern Express Co. v. National Bank of Tifton, Ga.*, 61 S. E. Rep. 857.

57. **Grand Jury—Interpreters.**—An interpreter summoned by the grand jury is not disqualified to serve by being called as a witness to the facts under investigation, nor by reason of his being a deputy sheriff and taking an active part in the effort to discover the author of the

supposed crime under consideration.—*State v. Firmatura, La.*, 46 So. Rep. 691.

58. **Guaranty**—Amount Recoverable.—Interest is recoverable against a guarantor from the time the debt became due and after demand and notice, although the effect is to increase the judgment beyond the limit fixed by the contract of guaranty.—*Johnson v. Charles D. Norton Co., U. S. C. C. of App., Sixth Circuit*, 159 Fed. Rep. 361.

59. **Guardian and Ward**—Settlement.—Where the mother of minor heirs, in proceeding for partition, purchased the property under such circumstances as to hold it in trust for them, the burden was upon her to show that, by her discharge as general guardian of the minor heirs, she was released from accounting for the proceeds of such property.—*Merkley v. Camden Safe Deposit & Trust Co., N. J.*, 69 Atl. Rep. 1100.

60. **Highways**—Establishments.—By continuous adverse use for 20 years, the public may acquire a prescriptive right to a road over any land which is subject to the state's right to lay out a road over it.—*State v. Washington, S. C.*, 61 S. E. Rep. 896.

61. **Homestead**—Exemptions.—Where a husband and wife owned adjoining tracts of land, cultivated as one farm, the fact that their dwelling house is located upon the wife's part of the land does not deprive the husband of the right to homestead exemption out of the part owned by him.—*Mann Bros. v. Jenkins, Ky.*, 110 S. W. Rep. 387.

62. **Homicide**—Provocation.—If one provokes a difficulty in order to have a pretext to kill another or inflict serious bodily injury upon him, he cannot justify such killing on the ground of self-defense, although it may subsequently be necessary for him to kill his adversary in order to save his own life.—*Young v. State, Tex.*, 110 S. W. Rep. 445.

63. **Husband and Wife**—Injury to Intended Wife.—No action lies by a husband against a person who has committed a tort on the woman whom the plaintiff was engaged to marry at the time, and whom he subsequently marries.—*Mead v. Baum, N. J.*, 69 Atl. Rep. 962.

64. **Injunction**—Labor Unions.—Workmen free from contract obligation have a legal right, singly or as a union, to strike and use any means not inconsistent with rights of others, provided no persuasion used of such a character as to leave the person solicited free to do as he pleases.—*Goldfield Consol. Mines Co. v. Goldfield Miners' Union No. 220, U. S. C. C., D. Nev.*, 159 Fed. Rep. 500.

65. **Intoxicating Liquors**—Justification of Sale Without License.—The refusal of the officers of a city to hear an application for and to issue a liquor license in accordance with an ordinance prohibiting the sale of intoxicating liquors without a license and prescribing the procedure for a license held no defense to a prosecution for a sale of liquor without a license.—*City of Montpelier v. Mills, Ind.*, 85 N. E. Rep. 6.

66.—**Indictment**.—In an indictment for selling intoxicating liquors without a license, it is not necessary to allege the time of the commission of the offense; time not being of the essence of the offense charged.—*State v. Conega, La.*, 46 So. Rep. 614.

67. **Landlord and Tenant**—Leases.—A lessee of a city held liable under a renewal of all taxes, the resolution for renewal recited therein, providing that it shall be according to the terms of the original lease, and the change in terms being an unauthorized one by the draftsman.—*City of Norfolk v. White, Va.*, 61 S. E. Rep. 870.

68. **Libel and Slander**—Special Damage.—To charge a physician with having stolen the land of a certain person does not charge a slander with reference to his profession, so as to be actionable without an allegation of special damage.—*Jones v. Bush, Ga.*, 62 S. E. Rep. 279.

69. **Mandamus**—Adequacy of Other Remedies.—Mandamus held not to lie to compel a justice of the peace to discharge a garnishee, there being an adequate remedy by appeal under Civ Code 1896, § 2185, or by certiorari.—*Tillman v. State, Ala.*, 46 So. Rep. 586.

70.—**Corporations**.—Where membership in a corporation depended on continuance of the members in the business of retail grocerymen, mandamus will not lie to reinstate an expelled member, where at the time of the trial he was ineligible.—*Ziegenheim v. Baltimore Wholesale Grocery Co., Md.*, 69 Atl. Rep. 1071.

71. **Master and Servant**—Assumed Risk.—Plaintiff, who had been employed at certain work for a year, held to have had enough experience in the work and a knowledge of the use of the appliances with which he worked to charge him with the assumption of risk.—*Stitzel v. A. Wilhelm Co., Pa.*, 69 Atl. Rep. 996.

72.—**Assumed Risk**.—When there is a safe and an unsafe way of executing an order, the employee who knows the difference, but adopts the unsafe way, assumes the risk.—*Taylor v. Rock Island, A. & L. R. Co., La.*, 46 So. Rep. 621.

73.—**Contract of Employment**.—The refusal of a servant to obey an order of the master does not afford legal ground for his discharge unless such order was reasonable, and that question is one of fact for the jury, although the contract is in writing and requires him to perform such services as the master may direct, and the order is also in writing.—*Development Co. of America v. King, U. S. C. C. of App., Second Circuit*, 161 Fed. Rep. 91.

74.—**Injuries to Servants**.—The mere fact that an experienced employee engaged in operating a metal stamping press, knew that, if his hand was under the die when he put his foot upon a treadle which released the die, his hand would be crushed, would not relieve the master from liability.—*Clemens v. Gem Fibre Package Co., Mich.*, 117 N. W. Rep. 187.

75. **Mines and Minerals**—Deeds.—Where a deed conveyed a certain coal bed, subsequent phrases that it was located "on Lackawanna Creek," on "Lot No. 1," "occupied by W.," merely identified the thing conveyed, and did not divide or define its extent.—*Delaware, L. & W. R. Co. v. Gleason, U. S. C. C. of App., Third Circuit*, 159 Fed. Rep. 383.

76. **Mortgages**—Notice of Prior Deed.—In an action to foreclose a mortgage defended by a subsequent grantee, claiming under a deed executed before, but recorded after the mortgage, on the ground that limitations had run against him, the burden was on plaintiff to show his want of notice of the deed.—*Hibernia Savings & Loan Soc. v. Farnham, Cal.*, 96 Pac. Rep. 9.

77. **Municipal Corporations—Actions.—Service** of notice on a writ of certiorari and of the hearing cannot be had on a municipality by service on the solicitor general of the judicial circuit wherein the municipality is located.—*Smith v. City of Washington, Ga.*, 61 S. E. Rep. 923.

78. **Municipal Corporations—Appointment of Officers.—**When the appointing power considers such proof of competency as is furnished by the applicant with such personal knowledge as may be possessed and information as may be acquired, the decision as to the competency is final.—*State v. Addison, Kan.*, 96 Pac. Rep. 66.

79. **Negligence—Contributory Negligence.—**It is not necessary, in order to render the negligence of a person the proximate cause of an injury, that he be guilty of some active, affirmative negligence; passive negligence being sufficient if it is the direct cause of the injury.—*McLean v. Atlantic Coast Line R. Co., S. C.*, 61 S. E. Rep. 900.

80. **Dangerous Premises.—**A person walking in the aisle of a department store is not required to exercise the same degree of caution in looking to obstructions on the floor as if he were walking on the highway.—*Bloomer v. Snellenburg, Pa.*, 69 Atl. Rep. 1124.

81. **Pleading.—**The rule that plaintiff shall not state one cause of action in his petition and recover upon another has no application where the specific negligence proved is within the scope of negligence pleaded generally in the petition.—*Knight v. Donnelly, Mo.*, 110 S. W. Rep. 687.

82. **Nuisance—Personal Discomfort.—**Where by the unlawful acts of defendant in operating a tallow plant the air which plaintiff and his family were compelled to breathe was polluted, plaintiff could recover for the personal discomfort resulting from the nuisance.—*Labasse v. Plat, La.*, 46 So. Rep. 665.

83. **Partition—Parties.—**A grantee of an easement in lands by two of three tenants in common held a necessary party to a suit for partition, and entitled to have a decree taken without notice to it opened and its rights considered.—*Jeter v. Knight, S. C.*, 62 S. E. Rep. 259.

84. **Partnership—Attorney's Fees on Firm Note.—**A partner who, without suit, pays a note containing a stipulation for attorney's fees in case of suit, has no right in the settlement of the partnership to recover such fees.—*Borah & Landen v. O'Neill, La.*, 46 So. Rep. 788.

85. **Perpetuities—Computation of Period.—**At common law, under a general power giving the donee the right to appoint at his pleasure the period of suspension of the power of alienation was computed from the time of the exercise of power.—*Farmers' Loan & Trust Co. v. Kip, N. Y.*, 85 N. E. Rep. 59.

86. **Pleading—Allegations Admitted by Failure to Deny.—**Where the allegations in an action on a note, with respect to attorney's fees, were not denied, they were tacitly admitted to be true, and a judgment was properly entered for attorney's fees, though there was no evidence on that subject.—*Jester v. Bainbridge State Bank, Ga.*, 61 S. E. Rep. 926.

87. **Post Office—Action on Bond.—**The government's moral obligation to pay over to senders or addressees of stolen mail the amount recovered on the bonds of the defaulting clerks is sufficient to enable the government to maintain an action on the bonds.—*United States v.*

American Surety Co. of New York, U. S. C. C., D. Md., 161 Fed. Rep. 149.

88. **Principal and Agent—Authority of Agent.—**Authority to an agent to purchase goods does not authorize him to subsequently admit the correctness of the account therefor so as to render his principal liable for the price of an account stated.—*Moore v. Maxwell & Delhomme, Ala.*, 46 So. Rep. 755.

89. **Prohibition—Parties Defendant.—**A writ of prohibition will not lie against the executive committee of a political party to prohibit it from recanvassing returns of a primary election.—*Kump v. McDonald, W. Va.*, 61 S. E. Rep. 909.

90. **Railroads—Duty of Pedestrians.—**Where the distance across four railroad tracks is only 49 feet, a traveler about to cross exercises due care if he stops, looks, and listens before venturing on the first track.—*Cherry v. Louisiana & A. Ry. Co., La.*, 46 So. Rep. 596.

91. **Fences.—**A railroad company held not negligent, in the absence of statute, in failing to erect fences or barriers to keep children from trespassing on its tracks.—*New York Cent. & H. R. R. Co. v. Price, U. S. C. C. of App., First Circuit*, 159 Fed. Rep. 330.

92. **Injury to Deaf Person on Track.—**There can be no presumption that a deaf person struck and killed by a wild engine while crossing a railroad track at a street crossing was in the exercise of due care.—*Shum's Adm'x v. Rutland R. Co., Vt.*, 69 Atl. Rep. 945.

93. **Rape—Evidence.—**Carnal knowledge includes carnal abuse, as used in Gen. St. 1902, sec. 1148, directed against one who shall carnally know and abuse a female under 16, and to "abuse" is not to injure the genital organs of the female.—*State v. Sebastian, Conn.*, 69 Atl. Rep. 1054.

94. **Release—Authority to Release.—**Release of underwriters primarily liable for the delay in salvage of certain vessels held a valid defense to the underwriter's claim to set off such damages against their liability under the contract for salvage.—*Klauck v. Federal Ins. Co.*, 111 N. Y. Supp. 1037.

95. **Release—Questions for Jury.—**Where defendant pleaded a release in an action for breach of contract, evidence that plaintiff was unable to read or write English, and that he signed the release under the belief that it was a receipt for money paid, held admissible.—*Cohen v. Schreiber*, 111 N. Y. Supp. 702.

96. **Religious Societies—Title to Property.—**The title of the Roman Catholic Church in Porto Rico to temples dedicated to religious uses held not affected by the fact that some of the funds for building the same were public funds appropriated by the municipality of Ponce, where such appropriations were made without reservation or restriction.—*Municipality of Ponce v. Roman Catholic Apostolic Church in Porto Rico, U. S. C. C.*, 28 Sup. Ct. Rep. 737.

97. **Removal of Causes—Diversity of Citizenship.—**Where a petition for removal for diversity of citizenship was filed by one defendant alone and neither petition nor the record showed that the other defendant was a mere nominal or formal party, the petition was fatally defective.—*Santa Clara County v. Goldy Mach. Co., U. S. C. C., N. D. Cal.*, 159 Fed. Rep. 750.

98. **Sales—Conditional Sales.**—On a breach of contract for the payment of a beet pulp drier, in dried pulp the seller having retained title to the drier until paid for, it was entitled to recover possession of the drier and also damages for breach of contract or for the balance of the price unpaid in money.—*Sugar Beets Product Co. v. Lyons Beet Sugar Refining Co.*, U. S. C. C., W. D. N. Y., 161 Fed. Rep. 215.

99. **Evidence.**—In an action for the price of goods, it was not essential that the order therefor be signed by the buyer to be admissible in evidence, where the seller's representative testified that it was the original order.—*Butler v. Ederheimer*, Fla., 47 So. Rep. 23.

100. **States—Premature Sale of Municipal Warrants.**—Where the State Treasurer having custody of a municipal warranty sells it without authority before funds have been raised for its redemption, and becomes liable for its conversion, the measure of damages to the state does not necessarily include interest up to the time of its payment.—*State v. Kelly*, Kan., 96 Pac. Rep. 40.

101. **Street Railroads—Competency of Employees.**—Employment of motorman under 21 held to put on the employer the burden to show his competency.—*Cloud v. Alexandria Electric Ry. Co.*, La., 46 So. Rep. 1017.

102. **Failure to Give Transfer.**—Where a person entered a street car to go to a designated place and paid the fare, and the company was obliged to carry her to the designated place and give her a transfer to enable her so to do, the refusal to give a transfer was a refusal to carry her to her destination.—*South Covington & C. St. Ry. Co. v. Quinn*, Ky., 110 S. W. Rep. 404.

103. **Injury to Child.**—Street railroad held liable where motorman fails to stop car on seeing child in danger.—*Taterewicz v. United Traction Co.*, Pa., 69 Atl. Rep. 995.

104. **Sunday—Labor.**—To keep open, manage, and superintend a theater and sell tickets therein on Sunday is "labor," within the meaning of Sunday ordinance.—*City of Topeka v. Crawford*, Kan., 96 Pac. Rep. 862.

105. **Taxation—National Banks.**—That the value of the shares of a national bank includes value due to non-taxable United States bonds owned by the bank is no objection to the validity of an assessment of such shares for taxation by a state without excluding the value of the bonds.—*Hager v. American Nat. Bank*, U. S. C. C. of App., Sixth Circuit, 159 Fed. Rep. 396.

106. **Telegraphs and Telephones—Negligence.**—It is not essential that the particular loss due to negligence in the transmission of a telegram should have been contemplated to render the telegraph company liable.—*Western Union Telegraph Co. v. Merritt*, Fla., 46 So. Rep. 1024.

107. **Territories—Scope of Local Legislation.**—General prohibitions in Act July 30, c. 818, 886, 24 Stat. 170, against territorial legislation by local or special laws, do not apply where specific permission to the contrary is granted by the organic act of a particular territory.—*Municipality of Ponce v. Roman Catholic Apostolic Church in Porto Rico*, U. S. S. C., 28 Sup. Ct. Rep. 737.

108. **Torts—Joint and Several Liability.**—Where separate acts of negligence of two parties are the direct cause of a single injury, and it is impossible to determine in what proportion each contributed to the injury, each is responsible for the whole injury.—*Goldstein v. Tunick*, 110 N. Y. Supp. 905.

109. **Towns—Change of Members of Board.**—Where the membership of a town advisory board changed pending a suit against the board, the old members had no standing in court beyond the right to call the court's attention to their substitution.—*Advisory Board of Harrison Tp. v. State*, Ind., 85 N. E. Rep. 18.

110. **Trial—Instructions.**—That the trial judge, in an action for injuries to a servant, used the term "ordinary care" in his charge, instead of "ordinary care and diligence," and did not use the expression "skill and diligence,"

held not to require a reversal, where the jury were not misled.—*Atlanta, K. & N. Ry. Co. v. Tilson*, Ga., 62 S. E. Rep. 281.

111. **Settlement of School Lands.**—Though on adverse claims to school land the findings do not state which one of the several claimants first settled thereon a judgment against one of them necessarily determines the fact of whether he made the first settlement against him where it is essential to support the judgment.—*Christensen v. Bartlett*, Kan., 95 Pac. Rep. 1130.

112. **Trusts—Constructive Trusts.**—Where two persons contract with each other to purchase stock and divided the stock acquired and the expense incurred, and one of the parties having purchased stock refuses to carry out the contract, equity will hold him a trustee *ex maleficio* and will enforce the trust.—*Sherman v. Herr*, Pa., 69 Atl. Rep. 899.

113. **Vendor and Purchaser—Annuity.**—An owner may sell his property payable in installments at long intervals and thereby transfer a valid title, though the purpose may be to provide for an annuity.—*Rudolf v. Gerdy*, La., 46 So. Rep. 598.

114. **Waters and Water Courses—Private Fire Protection.**—That a municipal regulation respecting water taken from a city's mains for private fire protection has been put in force gradually held no ground for enjoining its enforcement in a particular case.—*Shaw Stocking Co. v. City of Lowell*, Mass., 85 N. E. Rep. 90.

115. **Water Companies.**—A water company under a franchise from a city and under its contract with it held under a public duty to furnish to the inhabitants for domestic use a supply of water at fixed tolls, and for a breach of this duty it is liable in damages to a citizen.—*Macon Gaslight & Water Co. v. Freeman*, Ga., 61 S. E. Rep. 884.

116. **Wills—Construction.**—Before the personal estate of a decedent is relieved from the payment of debts, legacies, and expenses of settling the estate, it must clearly appear that the testator intended that it should be.—*Martin v. Andrews*, 111 N. Y. Supp. 40.

117. **Construction.**—A residuary clause in a will providing for a sale on the death of the survivor of testator's intended wife or his daughter M. held not to indicate that a remainder to his children was contingent.—*Trowbridge v. Coss*, 110 N. Y. Supp. 1108.

118. **Validity.**—A husband interested in the personal property of testatrix, and her sister, an heir at law in her real estate, may sue to determine the invalidity of the will, under Code Civ. Proc. § 2653a.—*Wood v. Fagan*, 110 N. Y. Supp. 938.

119. **Witness—Cross-Examination.**—Where a witness for the state testified that she did not know that defendant had ever whipped her, it was not error to allow the prosecuting attorney, after stating that he was surprised by the testimony, to ask the witness if she did not tell him in the jury room the day before that defendant had beaten her a number of times.—*Washington v. State*, Ala., 46 So. Rep. 778.

120. **Impeachment.**—That prosecutor is ball for witness testifying against defendant is relevant on the question of the witness' credibility.—*Bates v. State*, Ga., 61 S. E. Rep. 888.

121. **Re-examination.**—Under the federal practice, permitting the re-examination of witnesses in a criminal case with respect to matters not brought out in cross-examination, is within the discretion of the trial court.—*Jacobs v. United States*, U. S. C. C. of App., First Circuit, 161 Fed. Rep. 694.

122. **Refreshing Memory.**—Though the memory of a witness needs refreshing, it is not proper to read to the jury the contents of a memorandum made by him.—*Berkowsky v. New York City Ry. Co.*, 111 N. Y. Supp. 989.

123. **Impeaching Testimony.**—Testimony as to a statement made by a person injured immediately after the injury, and while he is in severe pain, blaming himself in a general way for the accident, is not entitled to great weight, as impeaching testimony in respect to the facts which is thoroughly reliable.—*The Ocracoke*, U. S. D. C., E. D. Va., 159 Fed. Rep. 552.

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THE FAILURE OF AMERICAN CRIMINAL
LAW.

America is at a decided disadvantage in contrast with England in the matter of the prompt and efficient administration of the criminal law. Unreasonable delays and miscarriages of justice based on the merest technicality have in recent years become the subject of much public animadversion.

In recent editorials we have called attention to the insidious encroachments of mob vengeance, creating a new order of executors of the law *de son tort* unknown to any system of jurisprudence, such as lynchers, white-cappers, black-handers, night-riders, etc. We have called attention to the causes and have suggested remedies. Hitherto, however, our suggestions have been addressed to every department of organized society except the courts. Now, for them; and the Lord have mercy on them, for they have been very guilty. We shall not shield them, while we have condemned every other contributing cause to this lamentable national calamity.

The most frequent charge made against the judicial administration is its interminable delays. On November 18, 1908, Attorney General Bonaparte in an address before the National Municipal League, speaking of some of the failures of American criminal law, said: "Why need there be a foretaste of eternity between arrest and indictment, another between indictment and trial, and yet another between trial and actual punishment?" This he answered by declaring that it is "partly because the bench and the professional opinion among the bar tolerate all kinds of dilatory, frivolous and often ridiculous proceedings on the part of unscrupulous counsel, intended to cheat justice of her plain due; partly because our law-makers afford almost infinite facilities

for review of judicial action to the criminal, although being very stingy in allowing them to the government; but mainly because laws show little sense of the value to society of a speedy administration of justice." Again at the close of his address he gave what he considered the principal cause of the failure of American criminal law. He said: "I think American criminal law to-day has very serious defects, and in a large measure fails of its purpose. A principal cause of this failure, to my mind, is its anxiety to guard against a danger which was once very serious, but which has now become almost chimerical, the danger lest men really innocent be convicted of crime."

The next serious indictment against the courts in their administration of criminal law is their inevitable inclination to reverse a case on the appearance of any technical error in the record, or in the admission or exclusion of evidence, without pursuing the further inquiry, whether such error materially affected the result or even whether it had any bearing whatever on the result. We are as jealous as anyone possibly could be, within reason, of the due and orderly administration of justice. Exact justice often depends on insistence upon those proper forms of pleadings and compliance with those general rules regulating the admission and exclusion of evidence that have come down to us through the experience of the ages that have gone before us. But many changes and modifications in some of these rules have become necessary to meet modern conditions; and, moreover, a new rule, clearly in support of the prompt administration of the law, requires a substantial rather than a technical compliance with all such rules and regulations. Courts who fail to give full force to this modern rule of construction in criminal causes and persistently cling to a rigid insistence upon unnecessary technical requirements will be forced to meet the contempt of the people, and the open resistance of men smarting under some outrage and unable to control the unlawful expression of their pent up feelings.

Almost every appellate court in the land has been guilty. We shall shield none of them, however, and shall consider it a favor if members of the bar will call our attention to recent utterances of their appellate tribunals, who in insisting upon some immaterial error, have outraged public opinion and thwarted the diligent efforts of the state in bringing some guilty offender to justice. For it must be remembered that justice is not always on the side of the accused. It is the grossest possible injustice to the law-abiding citizens of any community to throw back upon them a criminal whose difficult and hard-fought conviction on the first trial is overturned because of the most trifling error, and rendered more difficult of attainment on the second trial for many obvious reasons.

Taking the Missouri Supreme Court as an instance, we call attention to the recent case of *State v. Campbell*, 210 Mo. 202, where that court held that the absence of the word "the" before the word "state" in the clause "against the peace and dignity of the state," rendered the indictment absolutely void and reversed and remanded the case for a new trial. The case involved the crime of "rape," which next to murder most wildly arouses the public indignation. It does not take a philosopher to determine the effect of such a decision upon the community whose sense of justice and right has been outraged by the commission of such a crime. Lawyers may follow with something of interest the fine spun argument of the court as to the substantial significance of the article "the," which in some languages, as the Latin, is so tremendously important as not to have even an equivalent, but the general public, and even that class among them who are inclined to be thoughtful, and to think soberly, will regard the distinction sought to be made as the merest sophistry and as trifling with the sacred rights of the people.

Missouri is not alone in insisting upon this technicality. In West Virginia the appellate court decided that the abbrevia-

tion of "West Virginia" to "W. Virginia" invalidated the indictment. *Lemons v. State*, 4 W. Va. 755. The people of that state promptly rebuked this very technical construction by amending the constitution by striking out the words "of West Virginia," leaving the form to conclude as it does in Missouri and other states. In Arkansas, on the other hand, which requires the clause, "against the peace and dignity of the people of the State of Arkansas," it was held that the omission of the words "the people of" would not invalidate the indictment. *Anderson v. State*, 5 Ark. 444.

But without discussing the merits of this technical requirement or delicately indicating the weight of authority, we are prepared to say that the discussion is wholly anachronous; it belongs to the days of Queen Elizabeth when both the bench and bar split hairs with a precision that puts to shame our modern imitators, while justice wept unnoticed and unheeded without the gate. The people do not want a return of those days of technical hair-splitting, but have decreed by unmistakable indications that while courts shall construe the law strictly according to its tenor and effect, a substantial compliance therewith is sufficient without regard to the strict letter thereof. Unless courts are prepared fully to give effect to this modern rule of construction, especially in criminal cases, a large share of the responsibility for the spread of mob law and the individual and communistic enforcement of the criminal law, will be laid at their doors.

NOTES OF IMPORTANT DECISIONS

THEATERS AND SHOWS—LIABILITY OF MANAGEMENT FOR INJURY TO SPECTATOR UNDER IMPLIED CONTRACT AS TO SAFETY.—The management of a circus, theater, base ball or foot ball exhibition and every other kind of public exhibitions are not always fully advised as to the extent of the liability imposed upon them in regard to the safety of spectators whom they invite to their

performances. In the recent case of *Scott v. University of Michigan Athletic Assn.*, 116 N. W. 624, it was held that it is not enough to release an athletic association from liability for injury from collapse of a spectators' stand built by it, to a spectator who pays for the privilege of being on it, that the stand was erected by a competent and experienced builder, of good materials, and before use was inspected and pronounced safe by engineers and others competent to perform the work of inspection; but it impliedly contracts that except for unknown defects, not discoverable by reasonable means, the stand is safe. The court said: "The testimony goes much beyond proving merely an accident and resulting injury. That relied upon to show that defendants exercised due care tends to prove that the stand was erected by a competent and experienced builder, of good materials; that before it was used it was inspected by engineers and others admittedly competent to perform the work of inspection, who pronounced it safe. It is clear, however, that a wholly inadequate structure was in fact tendered for public use, and it cannot be determined, upon this record, as matter of law, that a latent and not a patent defect, discoverable in the exercise of proper care, existed. The managers of the grounds and stands occupied upon the occasion in question the position of proprietors of a public resort. Plaintiff was not a mere licensee, and did not occupy the stand by mere invitation. Whether responsibility to the plaintiff is grounded, in the form of action instituted, upon a contract or upon a duty, it exists, if at all, because of an implied contract. The implied contract was that the stand was reasonably fit and proper for the use to which it was put. The duty was to see to it that it was in a fit and proper condition for such use. Neither plaintiff nor the public generally would be expected to examine the stand and judge of its safety. This consideration, and the probable consequences of failure of the structure, imposed upon the responsible and profiting persons the duty of exercising a high degree of care to prevent disaster. They were not insurers of safety. They did not contract that there were no unknown defects not discoverable by the use of reasonable means, but having constructed the stand, they did contract that except for such defects it was safe. 1 Thomp. Neg. §§ 994-997; 21 Am. & Eng. Ency. Law, 472; *Francis v. Cockrell*, 5 L. R. Q. B. 184; s. c. 39 L. J. Rep. (N. S.) Q. B. 113, 39 L. J. Rep. (N. S.) C. L. 291. See also, *Fox v. Buffalo Park*, 21 App. Div. 321, 47 N. Y. Supp. 788; *Id.* 163 N. Y. 559, 57 N. E. 1109."

PROPERTY IN RUNNING AND FALLING WATER.

The most thorough going lawyer would hardly deem it necessary to go back to the "design" of the Creator to determine a property right *in praesenti*. Nevertheless even in this twentieth century, judges sometimes indulge in references to "natural law" and "natural right" and to "the law of God." Whether from a consciousness that their own decisions may not always square with the ideas suggested by these phrases, or that the one in hand is in need of a better foundation and support than that afforded by mere precedent or judge made law, we will not presume to determine. There are skeptics, in any case who will be disposed to doubt that even an unprecedented judicial decision, is likely to be much inferior "in wisdom and justice," to what are set forth as the decrees of the Almighty by a philosopher, who perhaps more than any other in America is responsible for the present movement of society towards socialism. In the first chapter of the seventh book of "Progress and Poverty," Mr. Henry George declares that: "The Almighty who created the earth for man and man for the earth, has entailed it upon all the generations of the children of men by a decree written upon the constitution of things—a decree which no human action can bar and no prescription determine." And from this decree, which Mr. George ascribes to the Almighty, it follows, that—"Though his titles have been acquiesced in by generation after generation, to the landed estates of the Duke of Westminster, the poorest child that is born in London today has as much right as his eldest son. Though the sovereign people of the state of New York, consent to the landed possessions of the Astors, the puniest infant that comes wailing into the world, in the squalidest room of the most miserable tenement house, becomes at that moment seized of an equal right with the millionaires. And it is robbed if the right is denied."¹ "Land-owners can make no just claim to com-

(1) p. 240.

pensation if society choose to resume its right."²

Huxley's criticism of these high-sounding phrases will not by many lawyers be deemed too severe. In his collection of essays, entitled, "Method and Results," page 379, he says: "Who would not be proud to be able to orate in this fashion? Whose heart would not beat high at the tempest of cheers which follow stirring words like these addressed to needy and ignorant men? How would the impassioned speaker's ear be able to catch a tone as of the howl of hungry wolves among the cheers? Why should he care that his stirring words might stir up the plain enough conclusion: Well, if these things are all ours as much as theirs, and we are the stronger, why do we not take our own, and that at once? What harm in robbing robbers?....According to Mr. George, that deed of entail, which he should have somewhere in his office, confers the land upon 'all the generations of the children of men.' Hence it follows that the London infant has no more title to the Duke of Westminster's land, and the New York baby no more to Messrs. Astor's land, than the child of a North American squaw, of a native Australian, or of a Hottentot. Property of the community forsooth. What right has any community, from a village to a nation to several property in land more than an individual man has?"

Natural justice can recognize no right in one (body of men) to the possession and enjoyment of land, that is not equally the right of all (their) fellows. (p. 240.)

Does it make any difference to the validity of this proposition, if I substitute the words in italics for the actual words 'man' and 'his'? So the splendid prospect held out to the poor and needy is a mere rhetorical mirage; and they have been cheated out of their cheers by mere 'bunkum.' Consider the effect of a sober and truthful statement of what the orating person really meant, or, according to his own principles ought to mean; say of such a speech as this:

My free and equal fellow countrymen,

(2) "Progress and Poverty," Preface, p. vii.

there is not the slightest doubt that not only the Duke of Westminster and the Messrs. Astor, but everybody who holds land from the area of a thousand square miles, to that of a table cloth, and who against all equity, denies that every pauper child has an equal right to it is a robber. (Loud and continued cheers, the audience, especially the paupers, standing up and waving hats). But my friends I am also bound to tell you that neither the pauper child, nor Messrs. Astor, nor the Duke of Westminster, have any more right to the land than the first nigger you may meet, or the Esquimaux at the north end of this great continent, or the Fuegians at the south end of it. Therefore before you proceed to use your strength in claiming your rights and take the land away from these usurping dukes and robbing Astors, you must recollect that you will have to go shares in the produce of the operation with the four hundred and odd millions of Chinamen, the hundred and fifty millions that inhabit Hindostan, the—(loud and long continued hisses; the audience, especially the paupers, standing up and projecting handy movables at the orator.)"

But while the principle which Mr. George enunciates as a decree of the Almighty is wholly unsound when applied to land, it is not without force when applied to water. In fact some of his arguments against private ownership in land, become truisms when used against private ownership in water. So manifest is it that the great waters of the globe have been, (to use the rhetoric of Mr. George "entailed upon all the generations of the children of men by a decree written upon the constitution of things," that neither private nor national ownership has ever been asserted to the great oceans of the earth.³ And with respect to shore waters, and the waters of navigable lakes and rivers while they have

(3) The poets of England have recognized her as "mistress of the seas," and it must be remembered too, that her sovereigns asserted supremacy over the small seas immediately surrounding her, and this supremacy seems to have been acknowledged in a measure by the neighboring monarchs. See note to *Goff v. Bougle*, 42 L. R. A. 161, where the annotator cites *Selden's Mare Clausum*, b. 2, ch. 30.

been the subject of national ownership yet their use as highways of commerce and travel, in modern days at least, is almost as free to strangers as to their owners. Thus the common rights of each and all to the waters of the earth is acknowledged in practice, and no one need take the trouble to prove it after the manner of the deductive philosopher; for even if private ownership had been decreed by the Almighty and allotments made, requiring only the occupancy of the elect, for the perfectionment of their titles, the condition would probably have still remained unperformed. Title by occupancy of navigable waters is a naked title, which no one is likely to take advantage of. It would require more than the present piscatorial propensities of mankind, to lead them to dispute possession with Neptune and his dolphins, for,

"Who would be
A mermaid fair,
Singing alone,
Combing her hair,
Underneath the sea?"

Obedience to the first law of nature will no doubt continue to be universally displayed so far as obedience consists in each refraining from jostling his fellows in his efforts to secure a habitation in Neptune's domains. And to this end natural law will doubtless continue to be abundantly sufficient and no one will need to invoke the aid of mere man made law.

Water a Gratuitous Offering of Nature.

—It is no part of the purpose of this article to argue that where private ownership in water has been sanctioned by law, the title of the owner should be held any less sacred than his title to any other species of property. Water, like land and every other element of the physical universe, is, in the language of Mr. George, a gratuitous offering of nature, in the sense that man has had nothing to do with its creation. But the conclusion which Mr. George draws that for that reason land should not be made the subject of private ownership, is as Professor Huxley very clearly showed wholly unwarranted. That water has for the most part been recognized as the common property of mankind, results from a

very different reason than that it is "a gratuitous offering of nature." It is common property as a highway of trade and travel, because, so far as the great oceans are concerned, these are practically the only artificial uses to which it can be put, and as a highway, it is of breadth sufficient to serve all comers. It is common property in the great seas for the same reason that light and air are common property. They cannot be appropriated so as to be made the subject of private property, for the source that supplies one is amply sufficient to supply all gratuitously. These "gratuitous offerings of nature" are shared by mankind in common, not because man has had no share in producing them, but because they have been produced in such abundance. Assuming that the mysteries of nature were known to some one individual and that all power over light, air and water, were given to him in the earth, so far as production is concerned, his products would cease to command a price when production had reached the magnitude attained by nature, wholly irrespective of the amount of labor expended in their production. The circumstance of its abundance, and the fact that it is so well fitted to serve man as a highway are clearly the chief reasons why water has been reserved for public uses. It must be remembered that a portion of the land of all civilized countries has also been reserved for public use. Had nature given us the public roads as they now exist, they would doubtless have been utilized as highways of travel, and reserved by the government for that purpose, not however for the reason that they would have been "gratuitous offerings of nature," but because of their fitness to serve as means of travel, and for the further reason that their sandy and gravelly composition would have rendered them unfit for any other purpose. But

Our Inquiry is With Reference to the Fact Rather than the Policy of Public Ownership of Water Power.—Still the expediency of a policy has sometimes an important bearing upon the question: What in fact is the law? Considerations as to what

the law ought to be, sometimes aid in determining what the law is. For example, if an individual should assert exclusive ownership to a portion of a sandy, gravelly highway after it had been surveyed, marked off and dedicated to the public on the ground that he owned the land abutting on both sides of it and that his deeds made no allowance for the highway, but purported to give him the title to the whole; the court if it deemed that the policy of the law had not theretofore been sufficiently expounded, might proceed to a categorical statement, as to what the rights of the individual and the public ought to be under such circumstances. But we do not propose to undertake a detailed statement, or to enter upon an extended investigation of—

The Public Uses of Water Power.—In a former article,⁴ we pointed out that from the earliest colonial period in the New England settlements, especially in Massachusetts, mills run by water power were regarded as having a peculiar status. While the taking of the land and the water power necessary for a mill site was usually placed upon the ground that the development of manufacturing was thereby achieved, and the material interests of the whole state advanced,⁵ and that this made the taking a taking for public uses, yet there was usually, a tacit, if not an express recognition of a private interest in the water power taken. Of course the taking of a mill site, would involve the taking of the riparian owner's upland as well as the land under water,⁶ and hence the owner in such cases would be entitled to some remuneration for he would be entitled to compensation for the upland, there being no question as to the private character of the title to it, whatever the nature of his interest in the water or in the land under the water. In such cases there would be no necessity for determining the latter, and we have found no case where it has been expressly determin-

ed. Probably the mill sites were usually upon streams non-navigable for some of the acts at least were expressly confined to non-navigable streams,⁷ and they throw little light upon the character of the riparian owner's title to water power upon navigable streams, but they do show that the use to which the water power was applied (viz. manufacturing), was universally regarded as a public use in the states where the acts were sustained.⁸ We have seen too, that the courts regard water power as being put to a public use when used in developing electricity for lighting purposes, and indeed for any business controlled and regulated by the state.⁹

This broad doctrine will probably be limited to businesses which, by reason of natural or artificial conditions have become peculiarly subject to monopoly.¹⁰ Of such businesses, railroading is a good example, and the electrification of railroads is not only being considered by practical railroad men, but some of the companies have already adopted electricity for certain portions of their roads. In cities the smoke and soot from the chimneys of manufacturing establishments have long been regarded as a nuisance, and the abatement of a public nuisance is as much a public service as the operation of a street railway. To this end it would undoubtedly be within the governmental power of the states and nation to compel where practicable the substitution of electricity for coal. And although the reasoning may seem somewhat

(7) See note to *Head v. Amoskeag Mfg. Co.*, 113 U. S. 9, 28 L. Ed. 889, where one of the New Hampshire acts is quoted in full.

(8) See cases cited in Art. 67 Cent. L. J. 356.

(9) See Art. 67 Cent. L. J. 356, and cases cited.

(10) In *Munn v. Illinois*, 94 U. S. 113, 24 L. Ed. 77, it was said that in England, from time immemorial, and in this country from its first colonization, it was customary to regulate ferries, common carriers, hackmen, bakers, millers, public wharfingers, auctioneers, innkeepers and many other matters of like nature. There is no doubt but that the present tendency is toward an extension of government regulation. Much of the regulation, of course, proceeds upon the theory not that the business is of a public character, but that as in the case of the liquor traffic, its regulation is necessary as a police measure for the safeguarding of society from evils likely to arise from and incidental to the business.

(4) 67 Cent. L. J. 356.

(5) *Ryerson v. Brown*, 35 Mich. 332.

(6) *Harding v. Goodlet*, 3 Yerg. 41; 24 Am. Dec. 546.

far fetched it is at least worthy of consideration whether water power applied to the generation of electricity may not be regarded as used in a public service when electricity is the most convenient means at hand, for getting rid of the smoke nuisance.¹¹ Again, the telegraph and the telephone have long been regarded as public agencies and their operation is undoubtedly a public use. So, with wireless telegraphy, whose messages encircling the globe, not like the "martial strains" immortalized by Daniel Webster, but like the "still small voice" bearing promises of peace and good will to all who will take the trouble to listen with the proper receiving medium attuned to receive them.

*Public Use of Property in Private Hands
—Labor as the Basis of Title to Property.*

—That an agency is capable of being applied to a public use, does not argue that it may not also be the subject of private property. It is of course an important consideration in determining the attitude of government towards it. If it were the only agency capable of serving a great public end, it would become the duty of government to apply it to that end, although that might involve the taking of it from the hands of private owners, but it could only be so taken, under our constitutions, both state and national, upon just compensation being rendered therefor. But, of course, the public end might be as well served, and indeed better served by allowing the agency to remain as private property devoted to public uses under government regulation, than it could be if taken over absolutely by the government. Such is the present policy of the government towards the railroads of the country, and in a measure also toward the canals. Many of the latter although originally construct-

ed either by the states or by private corporations, have been purchased by the federal government. The power of congress in this connection is limited only by the necessities of commerce, or rather by what the Supreme Court may regard as a necessary regulation of commerce.¹² There is no doubt but that, if deemed essential for this purpose, all the water powers in the country might be taken over by the federal government. It is a question of expediency, not a question of constitutional limitation. As was said by Mr. Justice Waite with reference to the regulation of the electric telegraph: "Since the case of *Gibbons v. Ogden*, 9 Wheat. 1, it has never been doubted that commercial intercourse is an element of commerce which comes within the regulating power of congress, because being national in their operation, they should be under the protecting care of the national government.

"The powers thus granted are not confined to the instrumentalities of commerce or the postal service known or in use when the constitution was adopted, but they keep pace with the progress of the country, and adapt themselves to the new developments of time and circumstances. They extend from the horse with its rider, to the stage coach, from the sailing vessel to the steam boat, from the coach and the steam boat to the railroad, and from the railroad to the telegraph, as these new agencies are successively brought into use to meet the demands of increasing population and wealth. They were intended for the government of the business to which they relate, at all times and under all circumstances....

"The electric telegraph makes an epoch in the progress of time. In a little more than a quarter of a century it has changed the habits of business and become one of the necessities of commerce."

But our inquiry now is, whether the natural water powers of the country are not already public property. The public uses to which they may be put may by the court be regarded as having an important

¹¹ Such regulation as might be necessary to get rid of a nuisance to the public would be but a very ordinary exercise of the police power. For a discussion of the fundamental principles involved, see the following cases: *Munn v. Illinois*, 94 U. S. 113, 24 L. Ed. 77; *Calder v. Bull*, 3 Dall. 386; 1 L. Ed. 648; *Sturges v. Crowninshield*, 4 Wheat. 122, 4 L. Ed. 529; *U. S. v. Rio Grande Dam & Irrig. Co.*, 174 U. S. 703, 43 L. Ed. 1141; *Handy v. Globe Co.*, 4 L. R. A. 466, 41 Minn. 188, 42 N. W. 872.

¹² *Pensacola Tel. Co. v. West. Union Tel. Co.*, 96 U. S. 1, 24 L. Ed. 708.

bearing upon the question of their ownership, as may also the fact that they are "gratuitous offerings of nature," the hand of man having had no part in their formation. Henry George and his disciples regard labor as the ethical basis of all title to property, and in favor of this view much can be said, even from the legal standpoint. For if a man asserts title to property worth in the markets of today millions of dollars, although worth nothing when he became the owner of the land to which he claims it is appurtenant, the law will hold him to strict proof of his claim, particularly, where as in the case of water power, his labor has added nothing to its value. But while the expenditure of labor in producing affords an ethical basis of title to that which is produced, it would not alone be sufficient basis for a legal title. For example; the owner of land abutting upon a waterfall might go to great expense in applying the force of the falling water, to some useful purpose, and yet the fact that he had expended labor and money would not of itself give him title to the water power although without his labor it would have been running uselessly in the stream. That many of the natural water powers of the country have been developed is not of itself any assurance that the law will recognize the claim of those who have developed it to be the legal owners. If this should prove to be the situation of any who have developed water powers, they will be in no worse condition than thousands who have expended labor upon farms, or mining property the titles to which were defective. The expenditure of labor is no absolute test either in law or in morals of the rights of him who has expended it. A. would not be justified in retaining B.'s farm, because of the improvements he had put upon it. Nor would the improver of water power be justified in withholding the water power from the state if the state can show a superior title. The law usually takes into consideration all facts that would have a bearing on the issue from the moral standpoint. It does not decide questions solely upon abstract principles in any case. From the principle

that labor is the only valid basis for title to property Mr. George deduces the conclusion that there should be no private property in land, and if this principle be interpreted to mean that whatever nature bestows, is bestowed on all and is essentially the common property of all, his conclusion is sound, or rather, logical; and if the courts proceeded on this principle, they would undoubtedly hold that natural water powers are public property. But on the same principle they would be obliged to hold that all property is public property, for whatever form it finally assumes, it was originally a mere "gratuitous offering of nature." While in the delicately fashioned instruments of science, we see small resemblance to the original offering of nature in the form of iron deposited in the rocks yet these instruments contain absolutely nothing that did not come from nature's hands. Labor may change the form, but it cannot change the substance. To nature we owe every jot and tittle of personal property in exactly the same sense that to her we are indebted for land. It is true that from the open prairie to the cultivated farm there is not so great a transition as from the mine to the factory, but to utilize nature's offering in either case there must be labor expended. If the processes involved in production justify private property in manufactured articles, so also do the processes involved in transforming land in its natural state into a cultivated farm, justify private property in land, and so also the labor in developing water power might be urged as supporting a claim of private ownership. Still in the case of water power it must be admitted that the claim of labor as a basis of title has less force than in the case of land or of manufactured products. For—

Water Power is Not Diminished by Use.

—Perhaps for this reason it is said by Governor Deenan, to be inherently and necessarily public property. It is like the widow's cruse of oil and remains unimpaired although the numbers dependent upon it may be increased. Its power is the same whether it be made to drive one thousand or ten thousand turbines. It may indeed become impaired, not by use, but by

an unwise national policy which permits the destruction of the natural agents which regulate it. But if these natural agents are maintained the water powers of the country may be depended upon for a thousand years' continuous labor. By a proper national policy the language of the poet, may be true as a scientific statement:

'For men may come and men may go,
But I go on forever.'

W. A. COUTTS.

Sault Ste. Marie, Mich.

NEGLIGENCE—PLACES ATTRACTIVE TO CHILDREN.

MAYFIELD WATER & LIGHT CO. v. WEBB'S ADM'R.

Court of Appeals of Kentucky, June 20, 1908.

An electric wire, 18 feet above the ground, which could only be reached by climbing a pole or guy wires stretched from a pole to the ground at an angle of 45 degrees, was not a dangerous instrumentality attractive or alluring to children.

HOBSON, J.: The Mayfield Water & Light Company maintains a system of electric lights in Mayfield. It erected along College Cross street a line of poles 18 feet high, and at the top of the poles on a cross arm it placed two electric wires 20 inches apart and 18 feet from the ground. After this had been done, the Home Telephone Company put up a line of poles along the street 30 feet high, and on these poles it placed wire cables containing its telephone wires. At the intersection of Sixth street, the telephone poles turned in Sixth street, and to keep its pole straight at this point it attached two guy wires to the top of the pole and ran them out to a deadman, or log, buried in the ground; the guy wires running down from the top of the pole at an angle of about 45 degrees being about four feet apart at the ground and coming together at the top of the pole. The guy wires passed in about 8 inches of the electric wire. The children of the neighborhood would hold on to the upper guy wire with their hands and walk on the lower wire, and then slide down, using the wires to play upon. Charles M. Webb, a little boy 11 years old, was playing upon the wires in this way, when his head touched the electric wire, thus completing the circuit, and he was instantly killed. This suit was brought against both the electric light company and

the telephone company to recover for his death. A recovery was had in the circuit court for \$1,000, and the defendants appeal.

There was proof on the trial that the insulation on the electric light wire was defective, and there was also proof that, whatever the condition of the insulation might have been, the result would have been the same when the little boy's head touched it while he was standing on the other wire which ran into the ground; the proof being that the insulation will not protect from injury when such a high current of electricity is carried as was used on this wire. The ground upon which the recovery is rested is that in the construction of the wires they were made attractive and inviting to children, and that the defendants were guilty of negligence in so maintaining the wires and permitting them to remain in this dangerous and unprotected condition. This court has in a number of cases held electric light companies responsible where it permitted live wires to hang in the street. Thus, in *City of Owensboro v. York's Adm'r*, 117 Ky. 294, 77 S. W. 1130, a little boy 12 years old discovered that a wire was hot, and, being dared by one of his companions to touch it, got on a board, took it in his hands, and was killed. A judgment for the plaintiff was sustained. To same effect, see *Macon v. Paducah Street Railway Co.*, 110 Ky. 680, 62 S. W. 496; *Lexington Railroad Co. v. Fain's Adm'r*, 71 S. W. 628, 24 Ky. Law Rep. 1443; *Thomas v. City of Somerset*, 97 S. W. 420, 7 L. R. A. (N. S.) 963, 30 Ky. Law Rep. 131; *Maysville Gas Co. v. Thomas Adm'r*, 21 Ky. Law Rep. 1690; *Id.*, 75 S. W. 1129, 25 Ky. Law Rep. 403. But in all of these cases the wire was in the street. Here the wire was 18 feet above the street. It could only be reached by a person climbing the electric light pole or walking up the guy wire of the telephone company. In all the cases where a liability has been imposed for what is known as an attractive nuisance to children, the nuisance has been placed within their reach. We know of no case where this has been applied to things put 18 feet above the ground, which may only be reached by climbing a pole or walking up a wire. Such structures are not an invitation to children to use them. A child may climb a dead tree, and thus get hurt; but the owner of the tree cannot be said to maintain an attractive nuisance, because he keeps a rotten tree on his land. To climb this pole or walk this wire was as difficult as to climb a tree, and no reason would exist for holding one an attractive nuisance more than the other, for, if the limbs of the tree were brittle or rotten, there would be great danger in climbing out on

them. In *Simonton v. Citizens' Electric Light Co.*, 28 Tex. Civ. App. 374, 67 S. W. 530, the defendant had placed spikes in its poles for the use of its men in ascending and descending them. Children in the neighborhood got to using the pole in the same way. One of them went up on the pole and lost his balance and fell to the ground. It was held that the company was not liable. The spikes on the side of the pole would offer a much greater inducement to a child to climb the pole than the guy wire offered in the case before us. In *Johnson v. Paducah Laundry Co.*, 92 S. W. 330, 5 L. R. A. (N. S.) 733, 29 Ky. Law Rep. 59, the defendant had upon its open lot an open vat of hot water. The plaintiff walking upon the lot in the night for a purpose of his own and without right, fell into the vat of hot water and was burned. It was held that he could not recover. In *Schauf's Adm'r v. City of Paducah*, 106 Ky. 228, 50 S. W. 42, 90 Am. St. Rep. 220, a little boy wading out into an open pond on the property of the city to catch a bird got over his depth and was drowned. It was held that there could be no recovery. Other authorities are collected in these opinions. The tendency of the more recent cases is to restrict, rather than enlarge, the application of the principle laid down in what are called Turntable Cases, and to hold that the defendant is not liable unless he knows, or ought in the exercise of ordinary care to know, that his structure is alluring to children and endangers them. See note to *Barnes v. Shreveport R. R. Co.*, 49 Am. St. Rep. 416-426. In *Harris v. Cowles*, 38 Wash. 331, 80 Pac. 537, 107 Am. St. Rep. 847, a child was injured by a revolving door at the entrance to a building; the door being similar to those in common use in winter to keep out the cold. It was held that the trespasser, though a child of tender years, could not recover, on the ground that to extend the rule would be to impose a burden upon the property owners that would be unreasonable. The same principle was applied in *Fitzmaurice v. Connecticut R. R. Co.*, 78 Conn. 406, 62 Atl. 620, 112 Am. St. Rep. 159, where a child was burned at a pile of hot ashes left upon the defendant's premises, and in *Foster-Herbert v. Cut Stone Co.*, 115 Tenn. 688, 91 S. W. 199, 4 L. R. A. (N. S.) 804, 112 Am. St. Rep. 881, where a child climbed into a low wagon and was there hurt.

As long as electric light wires are not put under ground, they must be put upon poles, and, where they are placed above the street, as high as 18 feet, the company should not be required to anticipate that children will climb up to the wires and get hurt. Guy

wires are necessary on high poles at street corners where the line turns. A guy wire placed on a high pole to keep it in place, or some such contrivance, cannot well be dispensed with. Such a wire is not a dangerous instrumentality, attractive or alluring to children within the meaning of the Turntable Cases. The little boy was a trespasser upon the defendant's wire, and being a trespasser, he cannot complain that the premises were unsafe. Children, no less than adults, when they trespass upon the property of another, take the risk unless the circumstances bring the case within the principle of what is known as the Turntable Cases, where a dangerous instrumentality is maintained, with knowledge, actual or constructive, that it is alluring to children and endangers them. A wire 18 feet above the ground, which can only be reached as this wire was, cannot be said to fall within the exception to the general rule.

Judgment reversed, and cause remanded for further proceedings consistent herewith.

NOTE.—Liability of Owners of Dangerous Property Attractive to Children.—The Turntable Cases, the first and foremost of which is *Railroad Co. v. Stout*, 17 Wall. (U. S.) 657, imposed an exception to the well recognized rule that a landowner is under no obligation to use care to protect a trespasser, to-wit, that a landowner is liable for maintaining a dangerous article or contrivance on his premises which is attractive to children of tender years.

This doctrine has not been universally recognized by the courts and cannot be said to be a settled doctrine of the law. Indeed in view of the unsettled construction, we would not be surprised to find in a few years, the doctrine wholly discredited by the great weight of authority. Some of the most learned courts in the country have wholly repudiated the doctrine. *Ryan v. Towar*, 128 Mich. 463, 87 N. W. 644, 92 Am. St. Rep. 481, 55 L. R. A. 310; *Mangan v. Atterton*, L. R. 1 Exch. 239, 35 L. J. Exch. 161; *McEachern v. Railroad Co.*, 150 Mass. 515; *Walsh v. Railroad Co.*, 145 N. Y. 301, 45 Am. St. Rep. 615; *Paolino v. McKendall*, 24 R. I. 432, 53 Atl. 268, 66 Am. St. Rep. 736, 60 L. R. A. 133; *Hughes v. Railroad*, 71 N. H. 279, 51 Atl. 1070. Probably the best statement in opposition to the reasons announced as the basis of the Turntable Cases is that of *Ryan v. Towar*, supra. The court in that case extensively reviews the authorities and arrives at the result that the consensus of the best judicial opinion is opposed to the doctrine of the Turntable Cases and that "the courts and the profession have evinced a tendency to allow this innovation to go no further, and refuse to consider it applicable to other cases every way analogous. They speak of the cases generically, as the 'Turntable Cases,' and treat such cases as exceptional."

A review of the recent cases will show how steadily the courts are drawing away from a principle which, if it is not altogether wrong, is

limited to only a particular character of dangerous appliances. The following contrivances were held not attractive to children under the circumstances:

Empty cars of a street or steam railroad company, standing in open, unfenced yards where children were injured jumping on and off of them. *Barney v. Railroad Co.*, 126 Mo. 372; *Catlett v. Railway Co.*, 57 Ark. 461, 38 Am. St. Rep. 254; *Chicago, etc. R. R. v. Stumps*, 69 Ill. 409. Nor in such cases is a railroad company bound to keep such cars as to trespassing children in good repair, or the doors shut (*Curley v. Railroad Co.*, 98 Mo. 13); nor to guard them so that such a child cannot be injured by loosening the brakes (*Central Branch, etc., R. R. v. Henigh*, 23 Kans. 347, 33 Am. Rep. 167; *Haesley v. Railroad*, 46 Minn. 233, 24 Am. St. Rep. 220, 48 N. W. 1023; *Gay v. Railway Co.*, 159 Mass. 238; *O'Connor v. Railroad*, 44 La. Ann. 339); nor in leaving a hand car near the track (*Robinson v. Railway Co.*, 7 Utah, 493, 27 Pac. 689); nor to keep a lookout for trespassing children. *Cleveland, etc., R. R. v. Adair*, 12 Ind. App. 569, 39 N. E. 672; *Woodruff v. Railroad*, 47 Fed. 689; *Chrystal v. Railroad*, 105 N. Y. 164; *Masser v. Railway Co.*, 68 Iowa, 602, 27 N. W. 776; *Central R. R. v. Rylee*, 87 Ga. 491, 13 S. E. 584; *Mitchell v. R. R.*, 132 Pa. St. 226; *McDermott v. Railroad*, 93 Ky. 408, 20 S. W. 380; *Louisville, etc., R. R. v. Williams*, 69 Miss. 631, 12 South. 957; *Williams v. Railroad*, 96 Mo. 275.

Private property of individuals other than railroad companies is even more jealously protected by the courts even from infant trespassers. Thus a boy scalded while playing with scrap lead cannot recover. *Mergenthaler v. Kirby*, 79 Md. 182, 28 Atl. 1065, 47 Am. St. Rep. 371. So also a child drowned while playing on a defective bridge on private property is without a cause of action. *Marnock v. Simpson*, 10 Del. Co. (Pa.) 119. So also the owner is not liable for injury to a child playing with a hoisting apparatus situated within his mill. *Rodgers v. Lees*, 140 Pa. St. 475, 21 Atl. 399, 23 Am. St. Rep. 250, 12 L. R. A. 216. So also an unguarded excavation on the land of a private owner is not such an attractive danger as to impose an extra hazard upon the owner or to make him liable for injuries to child trespassers. *Ratte v. Dawson*, 50 Minn. 450, 52 N. W. 965; *Loftus v. Dehail*, 133 Cal. 214, 65 Pac. 379; *Gillespie v. McGowan*, 100 Pa. St. 144; *Savannah, etc., R. R. v. Beavers*, 113 Ga. 398, 39 S. E. 82, 54 L. R. A. 314. See, however, *Fink v. Furnace Co.*, 10 Mo. App. 61. The same rule applies to ponds, reservoirs, drains, sewers, etc. *Stendal v. Boyd*, 73 Minn. 53, 75 N. W. 735, 72 Am. St. Rep. 597, 42 L. R. A. 288; *Klix v. Nieman*, 68 Wis. 271, 60 Am. Rep. 854; *Trust Co. v. Grand Rapids*, 131 Mich. 571; *Rome v. Cheney*, 114 Ga. 194, 39 S. E. 933, 55 L. R. A. 221; *McCabe v. Woolen Co.*, 132 Fed. 1006; *Peters v. Bowman*, 115 Cal. 345; *Moran v. Car Co.*, 134 Mo. 641, 56 Am. St. Rep. 543; *Dobbins v. R. R. Co.*, 91 Tex. 60, 66 Am. St. Rep. 856; *Richards v. Connell*, 45 Neb. 467, 63 N. W. 915; *Pekin v. McMahon*, 154 Ill. 141, 39 N. E. 484, 45 Am. St. Rep. 114, 27 L. R. A. 206. This rule is extended also to electric light poles (*Simonton v. Light Co.*, 28 Tex. Civ. App. 374, 67 S. W. 530); stock pens (*Gulf, etc., R. R. v.*

Cunningham, 7 Tex. Civ. App. 65); wagons (*Conlon v. Bailey*, 58 Ill. App. 261); and stone coping (*Clark v. Richmond*, 83 Va. 355, 5 S. E. 369, 5 Am. St. Rep. 281).

The following cases have applied the doctrine of the Turntable Cases to other contrivances: *Cook v. Navigation Co.*, 76 Tex. 353, 13 S. W. 475, 18 Am. St. Rep. 52 (tug-boat); *Jensen v. Wetherell*, 79 Ill. App. 33 (cog-wheel); *Kopplekom v. Pipe Co.*, 16 Colo. App. 274, 64 Pac. 1047, 54 L. R. A. 284 (tubing); *Westerfield v. Levis*, 43 La. Ann. 63, 9 South. 52 (iron rollers); *Whirley v. Whiteman*, 1 Head (Tenn.) 610 (shafting); *Siddall v. Jansen*, 168 Ill. 43, 48 N. E. 191, 39 L. R. A. 112 (elevator); *Kelley v. Parker-Washington Co.*, 107 Mo. App. 490, 81 S. W. 631 (street scraper); *Kansas City, etc., R. R. v. Matson*, 68 Kans. 815, 75 Pac. 503 (piles of lumber).

JETSAM AND FLOTSAM.

FACTS ABOUT TILDEN WILL.

In justice to the memory of Charles O'Connor and James C. Carter, the story of their connection with the preparation of the will of Samuel J. Tilden, which has been put in permanent form by the printed report of the New York State Bar Association, recently issued, should not be allowed to stand without correction.

At the last annual meeting, in the course of a paper then read, I criticised the Tilden will as being a badly drawn document. In the discussion which followed, reference was made to the old story, which I had often heard and then believed, that the luckless will of Gov. Tilden was prepared by no less a lawyer than Charles O'Connor, and was submitted by him to James C. Carter for his suggestion and approval as to form before its execution.

After the meeting, Mr. John Brooks Leavitt informed me that Mr. Carter told him that he had taken no part in the preparation of the will and was in no way responsible for its form. This led me to make an investigation. The true story is now told in the letters I have received from John Bigelow, Joseph H. Choate, John Brooks Leavitt, and Edmund L. Laylies, the last named a partner of Mr. Carter for some years prior to his death. With slight variations as to detail and form of expression all agree on the main point—that Mr. Carter took no part in the preparation of the will, never saw it before its execution, and was in no way responsible for its form.

The letters of Messrs. Bigelow and Choate go somewhat further, and reveal a bit of history not heretofore known—viz., that Gov. Tilden was not altogether satisfied that his will was perfectly good in law, and that he intended to assure himself by consulting one of the highest authorities of his time, but neglected to do so.

The Hon. John Bigelow, who, as you know, is one of the executors and was a lifelong friend of Gov. Tilden, writes: "Neither Mr. O'Connor nor Mr. Carter was responsible for the final will of Mr. Tilden, though one or the other would have been had not Mr. Tilden been surprised by death before he had executed his

intention to profit by the counsel of either."

In answer to my suggestion calling Mr. Choate's attention to the fact that his remarks to the members of the State Bar Association, as reported in the published minutes of the last annual meeting, would seem to indicate that he shared the widespread opinion among lawyers that Mr. Carter was in some way responsible for the form of the Tilden will, Mr. Choate writes:

"My extemporaneous remarks at the close of the reading of your paper on 'Safe and Sound Wills,' before the New York State Bar Association, must have been carelessly reported, and the stenographer's report was never submitted to me for correction, so far as I remember, or, if it was, I could not have read it, for I could not let it stand uncorrected.

"Obviously, too, my remarks were carelessly made, and only purported to give the general understanding of the profession on the subject. 'everybody knows, &c.'

"Now that you distinctly challenge my recollection I do clearly remember that Mr. Carter told me in one of our conversations about the will that Gov. Tilden, in one of his visits to Greyston, showed him the will, and he pointed out to the Governor that the indefiniteness in the clause disposing of the estate, which afterward proved fatal to it, might bring it in question; that the Governor replied in effect, 'Well, I will ask you to come up again by and by, and we will put it in proper form,' but that he died without having sent for him as he had intended. He was much given to procrastination.

"As to Mr. O'Connor's part in it I have no personal knowledge. I know how intimate he and Gov. Tilden were, and I have no reason to doubt the correctness of your information about him, but what, if anything, more took place between them will never be known.

"Mr. Bigelow's statement as to Mr. Carter is exactly in accordance with what Mr. Carter told me. I am sorry that my casual remarks, which were evidently unpremeditated, got into print, as they ought not to have done, and have given you so much trouble."

While this correspondence relates mostly to Mr. Carter's non-participation in the preparation of the will, I have been informed on what seems to be good authority that Mr. O'Connor drew an earlier will for Gov. Tilden, which was used in part as a foundation for his last will. This also seems probable, as some portions of it are exceedingly well drawn. In this connection and as bearing on probabilities I note that Mr. O'Connor died at Nantucket, May 12, 1884, only nineteen days after Mr. Tilden's will was executed, and that he is said to have been ill some weeks prior thereto.

Whether the fatal wording of the will was due to Gov. Tilden's lack of special knowledge of the subject or to the unfortunate advice of some other person less familiar with testamentary writing will probably never be definitely known.

DANIEL S. REMSEN.

New York, Oct. 15, 1908.

JURIES AND THE UNWRITTEN LAW.

A most remarkable instance of the force of the unwritten law as a defense was brought out recently in the trial of J. B. Hubble, at Beloit, Kansas.

Mr. Hubble was charged with assaulting Ed Green, 24 years old, a suitor of Orpha Hubble,

the defendant's daughter, on the evening of July 18. Green was carved up to a fancy degree. Mr. Hubble came to Beloit the same evening to get his daughter, and upon going to the Sloan residence, east of town, where she was visiting, found her in company with Green. The defense was that Mr. Hubble had grounds for feeling that his daughter should not be in Green's company and due to the trying situation, fearing that Green was about to elope in a buggy with the girl, he was prompted to act as he did.

The surprising feature of the case occurred when Mr. Webster, one of the jury, went to Judge Pickler, stating that he had been delegated by the jury to express certain sentiments to the court. "We want to know if it would be advisable for the jury to add these comments to the verdict," said Mr. Webster. He was informed that would be out of order, so he expressed verbally to the court and to Mr. Hubble and his attorneys that the jury endorsed his actions. "We even maintain that you should either finish the job or prosecute Green in the courts of Rooks County," the jurymen told Mr. Hubble.

BOOK REVIEWS.

PROBATE REPORTS ANNOTATED, VOL. 12.

One of the best series of reports which we know anything about is the one which is the subject of review in this annotation. They are carefully selected and edited by Wm. Lawrence Clark, author of *Clark on Contracts*, etc. These volumes contain about 100 recent cases (in full) with many exhaustive notes, and, in addition to this about fifty pages of sufficiently full memoranda of other recent decisions in digest form. The monographic notes in volume IX cover about one hundred and thirty pages and are practically exhaustive of the cases on the subjects treated. Beginning with Vol. 9, very many of the cases reported in this series are followed by notes referring specifically to the other cases on the same subject and to notes in the preceding volumes of the series. This will enable subscribers to refer to all the cases and notes on the particular subject in hand without taking the time and trouble necessary to carefully examine the indices. In addition to this, another feature which began with Vol. X, and which will be continued and improved upon in subsequent volumes; namely, a digest of the decisions of general application on questions of probate law and practice, other than those reported in full, and which could be found by the practitioner only after a more or less laborious search through the late digest and reports. For judges and practitioners in probate, surrogate, and other courts in every state, these volumes will be indispensable, as presenting in its latest phases the most important points of probate law, and as giving each year, either in full or in a condensed form, practically all of the recent decisions of general application and value.

Printed in one volume of about 800 pages, and published by Baker, Voorhis & Co., New York.

HUMOR OF THE LAW.

Judge John H. Dillard, a justice of the Supreme Court of North Carolina at one time, is an example of personal independence. Judge John Kerr seeing Judge Dillard in a second-class car, called out:

"How comes it a man of your cloth is caught in a second-class car?"

"Because there is no third-class."

WEEKLY DIGEST.

Weekly Digest of ALL Current Opinions of
ALL the State and Territorial Courts of Last
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1. **Alteration of Instruments—Filling Blanks.**—Where a blank for the place of payment of a negotiable note was filled after delivery as authorized by Code Supp. 1907, sec. 3060-a14, filling such blank did not constitute a material alteration within sections 3060-a124 and 3060-a125.—*Johnston v. Hoover*, Iowa, 117 N. W. Rep. 277.

2. **Animals—Contributory Negligence of Owner.**—In an action for the drowning of plaintiff's cow which strayed and fell into an unguarded hole in the ice of a lake where defendants had been cutting ice, plaintiff held chargeable with contributory negligence.—*Richards v. Waltz*, Mich., 117 N. W. Rep. 193.

3. **Diseased Cows.**—The public authorities have the same right to require destruction of cows having tuberculosis without compensation and without judicial inquiry as they have to require the destruction of decayed meats and vegetables.—*City of New Orleans v. Charouleau*, La., 46 So. Rep. 911.

4. **Evidence of Viciousness.**—One suing for personal injuries inflicted by a domestic animal must show that the owner had knowledge of the vicious propensity of the animal prior to the time of the injuries.—*Thornton v. Layle*, Ky., 111 S. W. Rep. 279.

5. **Appeal and Error—Common Joinder in Error.**—The common joinder in error is an admission that what is returned as the record of the judgment below is true, and after joinder neither party can as of right allege diminution or have a certiorari.—*Tomlinson v. Armour & Co.*, N. J., 70 Atl. Rep. 314.

6. **Estoppel to Question Judgment.**—Where one has secured an order purging him of contempt and discharging him from an attachment on conditions to be performed by him, he cannot after accepting the benefit of the order attack by appeal one or more of the conditions imposed.—*Krauss v. Krauss*, N. J., 70 Atl. Rep. 305.

7. **Liability Insurance.**—An order setting aside a default judgment on defendant's cross-complaint must be affirmed, unless it affirm-

atively appears that there were no grounds on which the order could have been properly made.—*Wood v. Johnston*, Cal., 96 Pac. Rep. 508.

8. **Plea of Privilege.**—Where a claim of privilege to be sued in the county of defendant's residence was raised by plea involving an issue of fact, the denial thereof could not be reviewed in the absence of a statement of facts or a finding by the court in the record.—*Lumpkin v. Blewitt*, Tex., 111 S. W. Rep. 1072.

9. **Prior Appeals.**—Where, on a former appeal, a contention has been passed upon, and on subsequent appeal there is no material difference in the record, and the same arguments are used to sustain the contention as on the former appeal, the contention is not an open one.—*Anderson Carriage Co. v. Pungs*, Mich., 117 N. W. Rep. 162.

10. **Who May Appeal.**—The striking of a party defendant on appeal in intermediate court against whom a judgment was rendered in a justice's court discharges such defendant from any liability so that he cannot appeal therefrom.—*Hanie v. Taylor*, Ga., 61 S. E. Rep. 1054.

11. **Arbitration and Award—Agreement to Arbitrate.**—An agreement to arbitrate future damage to land held not invalid because concluding the owner against further claim for damages from a private nuisance.—*Tennessee Coal, Iron & R. Co. v. Russell*, Ala., 46 So. Rep. 866.

12. **Arrest—Relief of Persons Imprisoned.**—Gen. St. 1895, p. 1726, for the relief of persons imprisoned on civil process, is not a general insolvency act in conflict with the national bankruptcy law.—*Maroney v. La Barre*, N. J., 70 Atl. Rep. 156.

13. **Bailment—Negligence.**—In an action for injuries to plaintiff's carriage, which he had sent to defendant's shop to be repaired, defendant held not negligent in temporarily placing the carriage in the street in front of its warehouse preparatory to taking it to the repair shop.—*Studebaker Bros. Mfg. Co. v. Carter*, Tex., 111 S. W. Rep. 1086.

14. **Bankruptcy—Assignment.**—An assignment of so much of a bankrupt's interest in certain land which his ancestor had contracted to sell as was necessary to satisfy creditors held not void as a general assignment, under Bankr. Act, sec. 3, c. 541.—*Fidelity Trust Co. v. Kline*, N. J., 70 Atl. Rep. 151.

15. **Attachments.**—Under Bankr. Act, sec. 67f, c. 541, where creditors of an insolvent, within four months before a voluntary petition in bankruptcy, attached property that had been sold by him by a void sale, held, that the attachment lien would be preserved for the benefit of the bankrupt's estate, and the trustee became subrogated to all the rights of the attaching creditors thereunder.—*Love v. Hill*, Okl., 96 Pac. Rep. 623.

16. **Involuntary Proceedings.**—In involuntary bankrupt proceedings, the failure of the petition to allege that the bankrupt was such a corporation as could be declared an involuntary bankrupt held amendable so as to deprive the court of jurisdiction.—*McAfee v. Arnold & Mathis*, Ala., 46 So. Rep. 870.

17. **Priority of Judgment Creditors.**—Under Bankr. Act, c. 541, sec. 67, 32 Stat., 564, held the bankrupt had no interest superior to lien of judgments obtained more than four months prior to petition in bankruptcy.—*Meirkord v. Helming*, Iowa, 116 N. W. Rep. 785.

18. **Banks and Banking**—Payment of Forged Check.—Where, without consideration, a bank receives from a money lender money to be delivered to one of his customers on a check drawn by such customer, and pays the money on the check received in due course, that such check is a forgery will not render the bank liable for the amount of the same.—*People's Nat. Bank of Kingfisher v. Wheeler*, Okl., 96 Pac. Rep. 619.

19. **Benefit Societies**—Beneficiaries.—The widow and children of insured held entitled to the proceeds of a benefit certificate, though the insurance assessments were paid by another with the understanding that the person named in the certificate was a lawful beneficiary.—*Knights of Columbus v. McInerney*, Mich., 117 N. W. Rep. 166.

20. **Bills and Notes**—Bonafide Holders.—A transferee who takes collateral by way of substitution for other collateral surrendered becomes a holder for valuable consideration.—*Voss v. Chamberlain*, Iowa, 117 N. W. Rep. 269.

21.—Collateral Security.—In Missouri, where a negotiable note is transferred by the payee as collateral security for another note, and the transferee brings suit thereon against the maker, there can be no setoff or counterclaim or other defense to the note that does not arise out of the note itself or inhere therein.—*Powers v. Woolfolk*, Mo., 111 S. W. Rep. 1187.

22.—Holder for Value.—Bad faith must be brought home to the holder for value of a negotiable note whose rights accrued before maturity to defeat his recovery on the note on the ground of fraud.—*Rice v. Barrington*, N. J., 70 Atl. Rep. 169.

23. **Carriers**—Assault on Passenger.—A carrier held not responsible for an assault committed by a car greaser on a passenger who had become a trespasser, in ejecting him from the car, unless the greaser's act was done in assisting the conductor, at his express or implied request.—*Mills v. Seattle, R. & S. Ry. Co.*, Wash., 96 Pac. Rep. 520.

24.—Care in Transporting Live Stock.—A carrier is required to use the highest degree of care for the protection of a car load of stock which for its own convenience it sets out on a sidetrack, and leaves for several hours exposed to cold.—*Colsch v. Chicago, M. & St. P. Ry. Co.*, Iowa, 117 N. W. Rep. 281.

25. **Certiorari**—Persons Entitled.—The ruling that certiorari will not issue at the demand of one not a party to the proceeding in which the judgment sought to be reviewed was entered held not to prevent an individual citizen to invoke the remedy in a matter affecting the public generally.—*Hemmer v. Bonson*, Iowa, 117 N. W. Rep. 257.

26. **Compromise and Settlement**—Requisites.—Where an officer of a city was illegally removed without proceedings therefor, and a successor appointed, his acceptance of salary due up to the time of the attempted removal did not constitute a final settlement.—*Gracey v. City of St. Louis*, Mo., 111 S. W. Rep. 1159.

27. **Constitutional Law**—Obligation of Contracts.—The increase of capital stock beyond the limit provided by special charter against the objection of a shareholder held to impair the obligation of a contract so as to be prohibited by the United States Constitution.—*Elnstein v. Raritan Woolen Mills*, N. J., 70 Atl. Rep. 295.

28. —Right of State to Take Charge of Minor.—It is not an infringement on Const. art. 1, § 13, providing that no person shall be deprived of his liberty without due process of law, for the state to take charge of a minor for the purpose of protecting, educating, and training him.—*Ex parte Sharp*, Idaho, 96 Pac. Rep. 563.

29. **Contracts**—Implied Warranties.—Where a manufacturer contracts to supply an article of his own manufacture for a particular purpose, and the buyer trusts to the judgment of the manufacturer, there is an implied warranty that the article shall be fit for the purpose.—*Conkling v. Standard Oil Co.*, Iowa, 116 N. W. Rep. 822.

30.—Corporations.—In an action against a corporation for services, plaintiff held not precluded from recovering by the fact that the services were contracted for and a salary paid by another corporation.—*Ruttle v. What Cheer Coal Min. Co.*, Mich., 117 N. W. Rep. 168.

31. **Courts**—Jurisdiction.—Where defendant in a set-off claimed more than \$300, but confessed plaintiff's claim and only demanded judgment for the balance, which was less than \$300, the district court had jurisdiction.—*Bowler v. Osborne*, N. J., 70 Atl. Rep. 149.

32.—Void Ordinances.—The decision of the Court of Criminal Appeals that a city cannot enact a valid ordinance punishing offenses punishable under a general law of the state will be followed by the Court of Civil Appeals.—*Robinson v. City of Galveston*, Tex., 111 S. W. Rep. 1076.

33. **Covenants**—Estoppel.—A landowner entitled to enforce a building line restriction was not chargeable with abandonment by his failure to enforce previous violations in which he had no personal interest.—*Brigham v. H. G. Mulock Co.*, N. J., 70 Atl. Rep. 185.

34. **Criminal Law**—Venue.—It is not necessary to prove venue that some witness should testify directly that the crime was committed in a designated place, but it is sufficient if evidence incidentally given on the trial shows that the venue was properly laid.—*State v. Gilluly*, Wash., 96 Pac. Rep. 512.

35. **Criminal Trial**—Instructions.—A conviction of murder will be set aside where the court in its charge submitted two conflicting measures of proof to the jury, one of which was erroneous.—*Commonwealth v. Deltrick*, Pa., 70 Atl. Rep. 275.

36.—Sufficiency of Proof.—The sufficiency of proof of an accused's complicity, as a predicate for admitting acts and declarations of an alleged confederate, held primarily for the presiding judge; but, if its sufficiency is an issue, it should be submitted to the jury.—*Richards v. State*, Tex., 110 S. W. Rep. 432.

37. **Damages**—Compensation for Loss of Property.—One struck by a street car negligently operated, who was in no manner responsible for the collision, may recover for the loss of money and jewelry caused by the collision.—*Hof v. St. Louis Transit Co.*, Mo., 111 S. W. Rep. 1166.

38.—Excessive Damages.—Where, in a collision of plaintiff's train with another, plaintiff lost one foot and slightly injured one hand, a verdict for \$25,000 was so excessive as to indicate the jury was influenced by some improper motive.—*International & G. N. R. Co. v. Brice*, Tex., 111 S. W. Rep. 1094.

39.—Personal Injuries.—Where a servant in-

jured by the master's machine had never before been employed, and had acquired no status as a wage earner, held, that it could not be said as a matter of law that the loss of part of two fingers of the right hand would not affect his ability to earn money.—*Clemens v. Gem Fibre Package Co.*, Mich., 117 N. W. Rep. 187.

40. **Death—Damages.**—Where substantial pecuniary injury to next of kin appears in the evidence, there was no error in refusing to nonsuit or to charge that nominal damages only could be recovered.—*Polo v. Palisades Const. Co.*, N. J., 70 Atl. Rep. 161.

41. **Parties.**—Under Ky. St. 1903, §§ 4, 3690, and Civ. Code Prac. § 18, the widow of the one shot and killed by a town marshal held not required to join the town or the commonwealth as plaintiff in a suit against the marshal and his bondsmen.—*Bolton v. Ayers*, Ky., 110 S. W. Rep. 385.

42. **Presumptions as to Survivorship.**—There is no presumption of survivorship as to persons who perish in a common disaster, and the party asserting survivorship has the burden of proving it.—*Alevy v. Missouri Pac. Ry. Co.*, Mo., 111 S. W. Rep. 102.

43. **Deeds—Delivery.**—A deed placed in the hands of a third person for delivery to the grantee held to pass title to the grantee at the time of the delivery of the deed to him, notwithstanding the grantor's death.—*De Bow v. Wollenberg*, Or., 96 Pac. Rep. 538.

44. **Descent and Distribution—Laches.**—A wife who does not assert her rights in the property of her husband until after his death, though living apart from him, but does assert such right immediately after the death of such husband held not guilty of laches.—*Hilton v. Stewart*, Idaho, 96 Pac. Rep. 579.

45. **Personal Property.**—The title to personalty of an intestate is in the administrator, and, until proper ascertainment of a surplus after paying debts and costs of administration, an heir is not entitled to any part of it.—*People's Sav. Bank v. Hoppe*, Mo., 111 S. W. Rep. 1190.

46. **Dismissal and Nonsuit—Jurisdiction.**—Only courts of equity can dismiss cases without prejudice; action at law being only subject to dismissal by voluntary nonsuit before submission, under Shannon's Code, § 4691.—*B. E. Dodd & Son v. Nashville, C. & St. L. Ry. Co.*, Tenn., 110 S. W. Rep. 588.

47. **Divorce—Condonation.**—The law does not enforce condonation nor require a wife who declines to live with her husband who has been guilty of matrimonial offenses to be deemed guilty of desertion.—*Bovalrd v. Bovalrd*, Kan., 96 Pac. Rep. 666.

48. **Desertion.**—A wife who refused, without cause, to live in the home provided for by the husband, has the burden, when sued by the husband for divorce, to show that she changed her attitude, and notified the husband of her willingness to return.—*Purnell v. Purnell*, N. J., 70 Atl. Rep. 187.

49. **Evidence.**—In a suit by a husband for divorce on the ground of desertion, evidence held not to require the husband to make concessions with a view of terminating the separation caused by the wife willfully and obstinately remaining away from the home which he had provided.—*Purnell v. Purnell*, N. J., 70 Atl. Rep. 187.

50. **Domicile—Evidence.**—In the absence of proof that a person otherwise qualified has acquired a residence elsewhere, he must be considered to be a resident of the parish where his work requires him to stay, and where he has always lived and voted.—*Estopinal v. Michel*, La., 46 So. Rep. 907.

51. **Dower—Property Subject to Dower.**—Where a husband who had a contract for the purchase of real estate agreed to convey a part thereof to a third person and then received the legal title, the title was subject to the third person's right, which right was superior to the dower right of the wife.—*Inglis v. Fohey*, Wis., 116 N. W. Rep. 857.

52. **Elections—Qualification of Voter.**—The object of requiring a voter to have resided for a certain time at the place where he offers to vote is that he may have an opportunity to acquire the necessary information to vote intelligently, and to prevent colonization.—*Estopinal v. Michel*, La., 46 So. Rep. 907.

53. **Estoppel—Clothing Another With Apparent Title.**—To estop an owner of personal property from asserting his title against one who has dealt with the person in possession on the faith of his apparent ownership, something more than mere possession and control must be shown.—*Klewel v. Tanner*, Minn., 117 N. W. Rep. 231.

54. **Evidence—Admissions.**—In an action against a railroad company for negligence resulting the death of an employee, letters by defendant's chief surgeon held admissible; the doctrine of *res gestae* having no application.—*Phillips v. St. Louis & S. F. R. Co.*, Mo., 111 S. W. Rep. 109.

55. **Personal Injuries.**—In an action for personal injuries from an assault and from the bites of a dog, expert testimony showing the possibility of hydrophobia was improperly admitted where there were no symptoms of hydrophobia, and the dog did not have the disease.—*Bernadsky v. Erie R. Co.*, N. J., 70 Atl. Rep. 189.

56. **Qualifications of Expert.**—Where defendant company's superintendent and secretary testified that a witness had been hired by defendant to take charge of certain machines, defendant cannot contend that he was not qualified to testify as an expert in regard to the machines.—*Clemens v. Gem Fibre Package Co.*, Mich., 117 N. W. Rep. 187.

57. **Telephone Conversations.**—A conversation by telephone is admissible in evidence, when from all the circumstances the identity of the party answering the telephone is established with reasonable certainty.—*Barrett v. Magner*, Minn., 117 N. W. Rep. 245.

58. **Telephone Conversations.**—A telephone conversation may be repeated in evidence where such conversation is otherwise admissible, though the witness did not identify positively the person with whom he had the conversation.—*Conkling v. Standard Oil Co.*, Iowa, 116 N. W. Rep. 822.

59. **Executors and Administrators—Effects of Ancillary Appointment.**—Where a person is appointed as executor in Utah, and afterwards appointed administrator with will annexed in Idaho, he represents said estate in both jurisdictions.—*Hilton v. Stewart*, Idaho, 96 Pac. Rep. 579.

60. **Findings of Trial Court.**—A finding and order of the trial court that an executrix appeared to resist a claim against the estate held

a matter peculiarly within the knowledge of the trial court, and not reviewable on appeal.—*Wise v. Outtrim*, Iowa, 117 N. W. Rep. 264.

61.—**Mortgages.**—An executor held to have no power to pay mortgages, in the absence of authority in the will.—*Draper v. Brown*, Mich., 117 N. W. Rep. 213.

62. **Fences.**—**Destruction.**—In a prosecution for unlawfully pulling down the fence of G., if defendant instructed the subordinates to pull down S.'s fence, but they pulled down G.'s fence instead by mistake, defendant cannot be convicted.—*Gordon v. State*, Tex., 110 S. W. Rep. 146.

63. **Food.**—**Liabilities of Manufacturer.**—A manufacturer of canned goods held under the duty to the one who, in the ordinary course of trade becomes the ultimate purchaser, to exercise care that the goods used are fit for food and not tainted with poison.—*Tomlinson v. Armour & Co.*, N. J., 70 Atl. Rep. 314.

64. **Frauds, Statute of.**—**Agency to Sell Land.**—A contract employing an agent to find a purchaser for lands is not within the statute of frauds; though authority to convey can be given by deed only.—*Kempner v. Gans*, Ark., 111 S. W. Rep. 1123.

65.—**Availability as Defense.**—Where a promise to give a real estate mortgage is not in writing, equity cannot, on failure to execute the mortgage, declare the existence of an equitable mortgage, at least in the absence of such part performance as will take the case out of the statute of frauds.—*Edwards v. Scruggs*, Ala., 46 So. Rep. 850.

66.—**Contract to Convey Land.**—An oral contract for the sale of land held performed in part, so far as a strip in controversy was concerned, so that the vendor could not repudiate the same because of the statute of frauds.—*Starrett v. Boynton*, N. J., 70 Atl. Rep. 183.

67. **Fraudulent Conveyances.**—**Gifts.**—An agent through whom a gift is being effectuated cannot, after title has vested in him for that purpose, have the gift declared void, where the effect would be to enable him to keep the property for himself.—*Sullivan v. Fant*, Tex., 110 S. W. Rep. 507.

68. **Garnishment.**—**Nature of Remedy.**—In equitable garnishment, as in legal process having a similar object in view, nothing more can be accomplished against the debtor of defendant than in a direct suit against the former by the latter.—*People's Sav. Bank v. Hoppe*, Mo., 111 S. W. Rep. 1190.

69. **Homestead.**—**Abandonment.**—A rural homestead may be changed into an urban homestead and, after such change, the portion of the rural homestead which is not within the town, or which is not actually used for homestead purposes, loses its homestead character.—*Ayres v. Patton*, Tex., 111 S. W. Rep. 1079.

70. **Homicide.**—**Assault With Intent to Kill.**—That defendants' revolvers at the time defendants used them to shoot at a sheriff and his posse would not shoot accurately for the distance between defendants and the sheriff at the time held no objection to a conviction for assault with intent to kill.—*Warford v. People*, Colo., 96 Pac. Rep. 556.

71.—**Dying Declarations.**—In a murder trial, the state could not show that shortly after the shooting decedent, on being asked if he did not try to prevent accused from shooting him, stated that he tried to take the gun away from the

accused, but the first shot numbed him, so he could not, since the declaration was made in response to a leading and suggestive question.—*Lockhart v. State*, Tex., 111 S. W. Rep. 1024.

72.—**Manslaughter.**—In a prosecution for manslaughter, a requested instruction that defendant's house was his castle, and stating his right to defend it against attack, etc., is properly refused where it does not state defendant's belief in the facts hypothesized.—*Hill v. State*, Ala., 46 So. Rep. 864.

73.—**Self Defense.**—One authorized to make an arrest held not required to retreat but authorized to repel force with force, so that if a killing unavoidably results the homicide is justified.—*Birt v. State*, Ala., 46 So. Rep. 858.

74. **Husband and Wife.**—**Action for Alimony.**—When a wife separates herself from her husband and claims alimony, she must justify the separation by proof of extreme cruelty of the husband as if she were suing for divorce.—*Taylor v. Taylor*, N. J., 70 Atl. Rep. 323.

75.—**Incompatibility of Temper.**—Where incompatibility of temper led to a state of affairs rendering the living together of a husband and wife unbearable, the judgment for plaintiff in a suit by the wife for separation will be affirmed.—*Schlater v. Le Blanc*, La., 46 So. Rep. 921.

76. **Infants.**—**Right of State to Custody.**—It is not an infringement on any constitutional right of a minor for the state to summarily lay hold of him when deprived of his parents or guardian, and give to him the fostering care, and education due him from his parents or guardian.—*Ex parte Sharp*, Idaho, 96 Pac. Rep. 563.

77. **Injunction.**—**Restraining Enforcement of Void Ordinance.**—Where the enforcement of a void ordinance regulating plumbers will injure the business of a firm engaged in the plumbing business, injunction will lie to restrain the enforcement of the ordinance.—*Robinson v. City of Galveston*, Tex., 111 S. W. Rep. 1076.

78. **Interpleader.**—**Grounds of Relief.**—One employing under separate contracts two real estate agents to procure a purchaser of real estate held not entitled to maintain a bill of interpleader to require the two agents to interplead as to which is entitled to commissions for the sale.—*Maxwell v. Frazier*, Ore., 96 Pac. Rep. 548.

79. **Intoxicating Liquors.**—**Action on Liquor Dealers' Bond.**—In an action on a liquor dealer's bond for permitting a minor to enter and remain in his saloon, it was no defense that plaintiff, the minor's father, had authorized other dealers to sell liquor to the minor.—*Markus v. Thompson*, Tex., 111 S. W. Rep. 1074.

80.—**Petition for License.**—A "block" within the meaning of Denver City Charter, sec. 75, requiring the consent of landowners to the issue of a license for the sale of intoxicating liquors, held to mean a square surrounded by streets, though it is divided into separate blocks for the purpose of designating the lots therein.—*Slater v. Fire & Police Board of City & County of Denver*, Colo., 96 Pac. Rep. 554.

81. **Judicial Sales.**—**Proceedings to Vacate.**—The manner of bringing a grievance to the attention of the court in a proceeding to vacate an order confirming a sale made by order of the court of chancery held of no importance so long as the original parties to the suit and the purchaser have notice and an opportunity to be

heard.—*Butters v. Butters*, Mich., 117 N. W. Rep. 203.

82. **Judgment**—*Res Judicata*.—Where no appeal had been taken from an order admitting a will to probate in contested proceedings therefor, when an equity suit passed to a decree refusing to set aside the probate, the probate order was *res judicata* of all matters which could have been properly determined therein.—*In re Brown's Estate*, Iowa, 117 N. W. Rep. 260.

83.—**What Constitutes**.—A judge's memorandum on a trial docket that judgment had been entered for plaintiff held not a judgment upon which an execution could be issued.—*Winn v. McCraney*, Ala., 46 So. Rep. 854.

84. **Landlord and Tenant**—**Surrender of Term**.—A surrender of a term by operation of law will not be implied on proof that lessees had dissolved partnership and that an unauthorized person had tendered lessor the key.—*Creachen v. Achenberg*, N. J., 70 Atl. Rep. 160.

85. **Libel and Slander**—**Malice**.—On trial of complaining church members for libeling a member charged with wrong doing, the burden is on the latter to prove that the complaint was induced by express malice.—*Butterworth v. Todd*, N. J., 70 Atl. Rep. 139.

86. **Life Estates**—**Reservation**.—Where a husband owned certain land subject to his wife's inchoate right of dower, and they conveyed the land, reserving a life estate during their natural lives, the life estate was reserved to the husband individually and not to the wife, nor to the husband and wife jointly.—*White v. City of Marion*, Iowa, 117 N. W. Rep. 254.

87. **Limitation of Actions**—**Accrual of Cause of Action**.—Where by the negligent construction of a railway embankment, surface water is discharged on the land of an adjoining proprietor, his cause of action accrues at the date of the injury.—*Morse v. Chicago, B. & Q. Ry. Co.*, Neb., 116 N. W. Rep. 859.

88. **Master and Servant**—**Assumed Risks**.—If a machine at which a servant was put to work were not in proper condition, the servant would only assume such risks as he knew of or ought to have known of, and the dangerous character of which he ought to have appreciated.—*Clemens v. Gem Fibre Packing Co.*, Mich., 117 N. W. Rep. 187.

89.—**Assumed Risks**.—Where defendant railroad had promulgated rules by which plaintiff was governed, if plaintiff violated the rules, he assumed the risks incident thereto, and was *prima facie* guilty of contributory negligence as a matter of law.—*International & G. N. R. Co. v. Brice*, Tex., 111 S. W. Rep. 1094.

90.—**Assumed Risk**.—A servant injured by a steel chip from a chisel, while assuming the ordinary risk of the chipping of steel chisels when hammered, did not assume the extraordinary risk of the chipping of a defective steel chisel furnished by defendant.—*Manning v. Portland Steel Ship Bldg. Co.*, Ore., 96 Pac. Rep. 545.

91.—**Statutory Provisions**.—The removal on Sunday of coal from the sump in the bottom of a shaft in a coal mine held a part of the operation of the mine within Pub. Acts 1905, p. 143, No. 100, sec. 3.—*Capeling v. Saginaw Coal Co.*, Mich., 117 N. W. Rep. 182.

92.—**Vice Principal**.—Where an employee was intrusted with the discretion as to the time of withdrawing other employees from a sewer excavation before the explosion of a blast, he was

the representative of the master, and for any negligence the master was liable.—*Polo v. Palisade Const. Co.*, N. J., 70 Atl. Rep. 161.

93. **Mortgages**—**Consideration**.—Where defendant purchased certain mortgaged property, agreeing with the owner of the property to clear the title of all incumbrances and to erect a building thereon, and stated such facts to the mortgagee, who agreed in consideration thereof to extend the mortgage, the agreement was based on a sufficient consideration.—*Hall v. Parsons*, Minn., 117 N. W. Rep. 240.

94.—**Failure to Record Deed**.—The court held without power to set aside a sale in a chancery foreclosure of mortgage on the ground that the deed was not filed in the office of the register of deeds, as required by Pub. Acts 1899, p. 310, No. 200.—*Butters v. Butters*, Mich., 117 N. W. Rep. 203.

95.—**Foreclosure**.—A creditor holding mortgage to secure a loan, which act declares that the mortgage covers a certain per cent. for attorneys' fees in case of suit, must allege and prove circumstances warranting a demand for attorneys' fees.—*Succession of Howell*, La., 46 So. Rep. 933.

96. **Municipal Corporations**—**Leaving Vehicle in Street**.—Merely leaving a vehicle unguarded in a city street a reasonable length of time, for a legitimate purpose, would not constitute negligence per se.—*Studebaker Bros. Mfg. Co. v. Carter*, Tex., 111 S. W. Rep. 1086.

97.—**Negligence of Officers**.—It was not competent for a commissioner of parks and boulevards to rely wholly on the reports of his engineer and inspectors, or to the same extent that he might, were they appointed by others, and not entirely subject to his own discretion.—*Bolger v. Common Council of City of Detroit*, Mich., 117 N. W. Rep. 171.

98.—**Removal of Employee**.—Where a deputy inspector of boilers and elevators in the city of St. Louis was illegally removed, his acceptance of a temporary position as hoisting engineer was not incompatible with his duties as such deputy inspector, and does not prevent his recovery of salary for the balance of his official term.—*Gracey v. City of St. Louis*, Mo., 111 S. W. Rep. 1159.

99.—**Smoke Ordinance**.—Where a city charter empowers the adoption of ordinances necessary for the protection of persons and property and preservation of the public health, held sufficient power is given to sustain an ordinance for the suppression of dense smoke from smokestacks.—*Atlantic City v. France*, N. J., 70 Atl. Rep. 163.

100. **Municipal Corporations**—**Use of Streets**.—A bicyclist and automobilist using a street crossing as travelers owe each other the duty to use it with a reasonable regard to the rights of the other.—*Weber v. Swallow*, Wis., 113 N. W. Rep. 844.

101. **New Trial**—**Extent**.—A second trial in ejectment extends to all questions presented pertinent to the title and right of possession, including damages for use and occupation.—*Sammons v. Pike*, Minn., 117 N. W. Rep. 244.

102. **Negligence**—**Res Ipsa Loquitur**.—Where plaintiff's case shows the conditions under which an accident happened and the question is raised whether under the circumstances specified the conduct of defendant was negligent, the rule *res ipsa loquitur* does not apply.—*Dentz v. Pennsylvania R. Co.*, N. J., 70 Atl. Rep. 164.

103. **Nuisance**—Pleading and Proof.—The operation of a factory so as to constitute a nuisance may be given in evidence under an allegation that it was negligently operated, if the other allegations of fact make out a case of nuisance.—*Hinmon v. Sommers Brick Co.*, N. J., 70 Atl. Rep. 166.
104. **Partnership**—Liabilities to Creditors.—Partnership property is liable to attachment for the debts of a partner in his business, with which the co-partner has no concern, and the rights of the partners may be settled on the co-partner filing an interplea claiming ownership of the goods.—*Swofford Bros. Dry Goods Co. v. Diment*, Mo., 111 S. W. Rep. 1196.
105. **Partition**—Property Subject.—Where a wife occupies a homestead set apart for her use, and that of the family of her deceased husband, it is not liable to partition at the suit of the assignee of some of the adult heirs.—*Funk v. Baker*, Okl., 96 Pac. Rep. 608.
106. **Pledges**—Substitution of Collateral.—Where notes pledged as collateral security for another note were surrendered from time to time, on the statement that the makers desired to pay, and new notes were substituted as collateral security, there was no authority to collect the collateral for the creditor.—*Powers v. Woolfolk*, Mo., 111 S. W. Rep. 1187.
107. **Principal and Agent**—Authority of Agent.—A manufacturer who employs sales agents impliedly authorizes the agents to make representations concerning the quality and fitness of goods which are of such character that the proposed buyer cannot have knowledge of their properties.—*Conkling v. Standard Oil Co.*, Iowa, 116 N. W. Rep. 822.
108. **Railroads**—Frightening Animals.—A railroad company held liable for injuries to the driver of a team resulting from the frightening of the team by steam emitted from an engine at a railroad crossing.—*St. Louis Southwestern Ry. Co. of Texas v. Nelson*, Tex., 111 S. W. Rep. 1062.
109. **Sales**—Defenses.—Where a merchant directed another to have shipped to him corn of a certain grade over a certain railroad, that the corn while in transit became heated will not excuse the vendee from payment.—*Champlin v. Church*, N. J., 70 Atl. Rep. 138.
110. **Set-Off and Counter Claims**—When Maintainable.—Plaintiff agreed with defendant not to sue on a note within a certain time, but brought an action before the expiration of the time. Held, that the breach of contract and resulting damages might be interposed as a counterclaim.—*Hall v. Parsons*, Minn., 117 N. W. Rep. 240.
111. **Specific Performance**—Defenses.—Protest by vendors against retention of a disputed strip of land by vendee not made until two months after the vendee had entered into possession thereof held no defense to a suit for specific performance.—*Starrett v. Boynton*, N. J., 70 Atl. Rep. 183.
112. **Street Railroads**—Care of Passengers.—Where a street railway loads its cars so as to fill the standing room inside and the footboards outside, care of the passengers' safety must be proportionate to the dangers to which they are exposed.—*La Barge v. Union Electric Co.*, Iowa, 116 N. W. Rep. 816.
- 113.—**Injuries to Property**.—Where a street railway company ran its feed wire through the trees of an abutting land owner without permission, if the company was acting under rights granted to it by the public, the grant must be introduced in evidence by the defendant.—*Bathgate v. North Jersey St. Ry. Co.*, N. J., 70 Atl. Rep. 132.
- 114.—**Negligence of Motorneer**.—The motorneer of an electric car passing immediately in front of a fire engine house is guilty of double negligence when he drives at full speed in approaching such house, and fails to see in time to avoid collision with an outcoming hose cart a signal given while the car is 144 feet distant from the engine house.—*Dole v. New Orleans Ry. & Light Co.*, La., 46 So. Rep. 929.
115. **Taxation**—Double Taxation.—An occupation tax of a percentage of its gross earnings in a municipality imposed on a telephone company is valid notwithstanding such earnings are made in part of tolls and rentals over lines in part beyond the municipal limits.—*Nebraska Telephone Co. v. City of Lincoln*, Neb., 117 N. W. Rep. 284.
- 116.—**Soldier's Exemptions**.—A soldier's life estate in land should be considered in determining whether he has \$5,000 worth of property, and is therefore not entitled to a soldier's exemption from taxation under Code Supp. 1902, sec. 1304.—*White v. City of Marion*, Iowa, 117 N. W. Rep. 254.
- 117.—**Tax Sale**.—The original owners of land sold for taxes held not entitled to quiet title to it as against a purchaser from the state, in the absence of an offer to pay the amount for which the land was sold.—*Flannigan v. Towle*, Cal., 96 Pac. Rep. 507.
118. **Telegraphs and Telephones**—Failure to Deliver Long Distance Call.—Essential to a telephone company's liability for consequential damages caused by its negligent failure to notify one for whom a call is placed that another desires to talk to him, stated.—*Southwestern Telegraph & Telephone Co. v. Flood*, Tex., 111 S. W. Rep. 1064.
119. **Trial**—Instructions.—Failure in an action for negligence to instruct the jury to find for defendant, if not found guilty of negligence, held not reversible error, in the absence of a special request therefor.—*St. Louis Southwestern Ry. Co. of Texas v. Nelson*, Tex., 111 S. W. Rep. 1062.
120. **Venue**—Petition.—Where plaintiff brought suit in a county other than that of defendant's residence, and the petition alleged defendant's correct residence and did not show any legal right to sue outside thereof, defendant could have taken advantage of the defect by exception.—*Lumpkin v. Blewitt*, Tex., 111 S. W. Rep. 1072.
121. **Wills**—Construction.—Where a particular estate is created, with remainder to the children of a designated person, the gift by way of remainder will go, not only to the objects living at the death of testator, but to all who may subsequently come into existence before the period of distribution.—*Clark v. Morehous*, N. J., 70 Atl. Rep. 307.
- 122.—**Construction as to "Children"**.—Where testator made a devise over to his "children who shall then be living," the term "children" could not be enlarged to include grandchildren where there was nothing in the context to authorize such enlargement.—*Frank v. Frank*, Tenn., 111 S. W. Rep. 1119.
- 123.—**Revocation**.—That testator after making a will in favor of his wife was divorced held insufficient to constitute an implied revocation of the will at common law.—*In re Brown's Estate*, Iowa, 117 N. W. Rep. 260.
- 124.—**Undue Influence**.—Where a will is made by a patient in favor of his physician to the exclusion of relatives to whom ordinarily his property would go, with no reason appearing why such exclusion should occur, it is presumed on grounds of public policy that the will is void.—*Hitt v. Terry*, Miss., 46 So. Rep. 829.
125. **Witnesses**—Bias.—In a prosecution for forgery of an order for witness' fees, evidence that the prosecuting witness was an intimate friend of a person whom accused had unsuccessfully defended for a crime was inadmissible to show the witness' animosity towards accused.—*State v. Gilluly*, Wash., 96 Pac. Rep. 512.

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IS THE FEDERAL GOVERNMENT CAPABLE
OF TAKING OWNERLESS PROPERTY BY
ESCHEAT?

Ten years ago Congress enacted a law (29 Stat. 578) which provided that "it shall be the duty of the judge or judges of said courts (federal) to cause any moneys deposited as aforesaid, which have remained in the registry of the court unclaimed for ten years, or longer, to be deposited in a designated depository of the United States, to the credit of the United States." This statute was intended to apply to all moneys deposited in federal courts and which up to the time of the passage of the act had been held either in the court or with the treasurer of the United States subject to the court's order.

The operation of this statute it will be observed is in the nature of an escheatage of the moneys on deposit in federal courts to the federal government. The statute until recently seems never to have been construed by the federal courts, although from the apparently wide range of its operation it would seem likely to have provoked some litigation within the ten years since its enactment.

The recent case which now for the first time construes this statute is that of *American Loan & Trust Co. v. Grand Rivers Co.*, 159 Fed. 775. In this case it appeared that the sum of \$1,140, the balance of a larger sum deposited in court representing the net balance resulting on a foreclosure and sale, in 1894, of certain bonds and on the basis of which a certain dividend had been declared in favor of all the holders of said bonds on proper application and surrender of their securities, was still on deposit with the clerk of the district court for the western district of Kentucky, unclaimed. For fourteen years this money

had remained in the care of the court waiting for the appearance of those who were entitled to claim it. Finally, the district attorney filed a motion requesting an order upon the depository of such funds to transfer the amount so unclaimed to the treasurer of the United States, under the provisions of the act just referred to.

The court in refusing to grant the motion of the district attorney alleged two grounds for its refusal. First, because such statute provides for a proceeding in the nature of an escheat which is a power not granted to the federal government; second, that even if the federal government did have such power this statute was not a proper exercise of such power in that it did not provide for notice to the parties to whom the money was owing and therefore deprived such persons of their property without due process of law. We have no doubt that on the second ground given this statute is clearly unconstitutional as indicated by the court. But on this occasion we are more interested in the first ground given by the court and shall consider it a little more at length.

Is the federal government capable of taking ownerless property by escheat? The most exhaustive authoritative judicial discussion of the subject of escheat in this country is by the United States Supreme Court in the case of *Hamilton v. Brown*, 161 U. S. 256, 16 Sup. Ct. 585, 40 L. Ed. 691. In this case the court shows that at common law the right of escheat rested exclusively in the king or the ultimate sovereignty, that this ultimate sovereignty in this country is in the states and concludes as follows: "In this country, when the title to land fails for want of heirs or devisees, it escheats to the state as part of its common ownership, either by mere operation of law, or upon an inquest of office, according to the law of the particular state."

Relying on this decision and a few others which he cites, Judge Evans in the principal cases makes the following argument: "These authorities inevitably lead to the conclusion that the national government is not in any case the *parens patriae* to which

ownerless property of any sort in any state of the Union reverts. We think that within the states respectively it is the state which exclusively is *parens patriae*, and this result cannot be affected by the fact that the property might happen to be in the registry of a federal court. Though in the registry, it is nevertheless, a part of the general property in the states. The state, under the authorities cited, might with more plausibility be held to succeed to the title of such property, and might have the right through its escheator to apply to the court for it if any government be entitled to do so. In saying this we by no means intend to intimate that the state would, in fact, have the slightest right to an escheat of the money in court in this case. We only conclude, under the authorities cited, that if any government can claim to be *parens patriae* it is that of the states, and not that of the nation."

It would seem that the conclusion of the court in the principal case is the proper one with this limitation that so far as the territories are concerned, Congress, as the ultimate sovereignty may provide for escheating ownerless property located in such territories. *Mormon Church v. United States*, 136 U. S. 1, 57 Sup. Ct. 792, 34 L. Ed. 481. But even in such cases, if the personal property is afterwards removed from the territory to a state or if when the escheat occurs the territory has become a state, the national government loses all power to escheat the property even where such property is held by direct patent from the federal government. *Etheridge v. Doe*, 18 Ala. 565.

NOTES OF IMPORTANT DECISIONS.

MARRIAGE—RIGHT TO ALIMONY ON ANNULMENT OF MARRIAGE.—Strictly speaking, there can be no allowance of alimony on a decree annulling a marriage for the reason that the decree in such a case in effect declares the marriage void ab initio; that is, there never was a marriage, and therefore no such rela-

tion has existed which will justify a decree of alimony. Practically speaking, however, courts are accustomed to make such disposition of the supposed husband's property which in effect has much in common with a decree of alimony.

This practice is well illustrated by the recent case of *Buckley v. Buckley*, 96 Pac. 1079, where the supreme court of Washington held that where a woman, who in good faith entered into a marriage contract, with a man having a former wife living, materially helped to acquire and save property held by him, the court, on annulling the marriage at the suit of the woman, has jurisdiction, as between the parties, to dispose of the property as it has in case of granting a divorce. The court said: "It is the contention of Andrew Buckley that Mary Buckley never became his wife, and that the court was without authority to award her any portion of the property standing in his name or which he had acquired. Whatever may be said of the right of Mary Buckley to recover in the form of action instituted here, it cannot be doubted that she is entitled to some redress or compensation in some form of action against Andrew Buckley. Under the law of this state, the courts are called upon to regard substance rather than form, and it is not the policy of our law to turn a suitor out of one door of the court to come in at another in order to secure justice. Where a woman in good faith enters into a marriage contract with a man, and they assume and enter into the marriage state pursuant to any ceremony or agreement recognized by the law of the place, which marriage would be legal except for the incompetency of the man which he conceals from the woman, a status is created which will justify a court in rendering a decree of annulment of the attempted and assumed marriage contract upon complaint of the innocent party; and where in such a case the facts are as they have been found here, where the woman helped to acquire and very materially to save the property, the court has jurisdiction, as between the parties, to dispose of their property as it would do, in a case of granting a divorce, awarding to the innocent, injured woman such proportion of the property as, under all the circumstances, would be just and equitable."

Another interesting and comparatively recent case on this same question is that of *Werner v. Werner*, 59 Kans. 399, 53 Pac. 127, 41 L. R. A. 349, 68 Am. St. Rep. 372. In that case the court said: "Strictly speaking, this action as it was tried was not a divorce proceeding, but it was rather one to annul a void marriage. Although instituted under the statutes to obtain a divorce, the pleadings were so drawn, and the issues so shaped, that it was within

the power of the court to grant relief independently of the statutes relating to divorce, and it rendered a decree of nullity, rather than a decree of divorce. The plaintiff below set forth at length the description and nature of the property which had been acquired by the parties, the manner in which it had been acquired, and her interest in the same, and in the prayer of her reply she asked to be allowed a just and equitable division of the same in case the marriage was held to be null and void. The court, in its decree, did not treat the award as alimony, but rather adjudged her a share of the property jointly accumulated by the parties during the time they lived together as husband and wife. *Fuller v. Fuller*, 33 Kans. 582 greatly relied on by the plaintiff in error, holds, it is true, that in an action of this character the defendant is not entitled to recover permanent alimony; but at the same time it is expressly stated: 'That in all judicial separations of persons who have lived together as husband and wife a fair and equitable division of their property should be had; and the court, in making such division, should inquire into the amount that each originally owned, the amount that each party received while they were living together, and the amount of their joint accumulation.' Even in cases where the marriage is valid, and a divorce is refused for any cause, the court may adjudge an equitable division and disposition of the property of the parties. Code Civ. Proc. § 643 (Gen. St. 1901, § 5136). But independently of the statute of divorce, we think the court had authority to decree not only an annulment of the marriage, but also the division of the property which had been jointly accumulated by the parties. It was an equitable proceeding, and within its equity power the district court had full jurisdiction to give adequate relief to the parties. The division that was made was eminently equitable and just."

See also, *Schrimshire v. Schrimshire*, 4 Eng. Enc. 562; *Arey v. Arey*, 22 Wash. 261, 60 Pac. 724; *Strode v. Strode*, 3 Bush (Ky.) 227, 98 Am. Dec. 211; *Elliot v. Elliot*, 77 Wis. 634, 46 N. W. 806, 10 L. R. A. 568; *Barkley v. Dumke*, 99 Tex. 150, 87 S. W. 1147; *Selby v. Selby*, 27 R. I. 172, 61 Atl. 142; *Stapelberg v. Stapelberg*, 77 Conn. 31, 58 Atl. 233; *Gore v. Gore*, 89 N. Y. Supp. 902; *Blankenmeister v. Blankenmeister*, 106 Mo. App. 390, 80 S. W. 706. The rule is otherwise where wife admits marriage to be a nullity. *Knott v. Knott* (N. J.), 51 Atl. 15; *Appleton v. Warner*, 51 Barb. (N. Y.) 270.

THE DEFENSE IN ACTIONS FOR PERSONAL INJURY WHEN THERE HAS BEEN A VIOLATION OF STATUTORY REGULATION BY THE DEFENDANT.

The defense most frequently interposed in an action for personal injury, is that of contributory negligence. The doctrine of this defense is pretty well understood by most practitioners, and an explanation of it here would not be undertaken except for the fact that it must be borne in mind during a discussion of the above subject, in order to see wherein the courts have made some distinctions in its use. The theory upon which contributory negligence as a matter of defense, is sustained, is this: that a person, who, himself, has been guilty of negligence directly contributing to his injury, is in no position to complain of the negligence of anyone else, though the negligence of that other person may have been responsible to some extent for the injury sustained, and hence an action for damages cannot be successfully maintained. In other words, whenever a person undertakes to hold someone responsible for an injury sustained by him, he must be able to show that he, himself, was free from fault.¹ As to what constitutes contributory negligence, the same as with negligence, is usually a matter to be determined upon the trial of each particular case. This doctrine of precluding a recovery in cases where the negligence of the injured had directly contributed to the injury, has been modified in many jurisdictions by what is known as the doctrine of comparative negligence. The theory upon which that doctrine is sustained is, that even though the injury resulted in part from the negligence of the injured, himself, yet if the defendant was guilty of negligence of a greater degree, then a recovery is allowed.² The allowance of a recovery under this rule necessitates a classification of negligence as to whether it is *slight* negligence, or *gross* negligence. Manifestly, it is a much less harsh rule than

(1) See cases cited Am. & Eng. Ency. of Law, vol. 7, p. 368; also Cent. Dig., vol. 34, col. 1252.

(2) See cases cited Cent. Dig., vol. 34, col. 1259.

the one that precludes any recovery if the injured has been guilty of any negligence at all contributing to his injury.

The defense interposed in personal injury cases, next in frequency to that of contributory negligence, is that of assumption of risk. This defense is based upon the theory that a person voluntarily entering into a contract of hiring assumes all the risks and hazards ordinarily and usually incident to such employment, and will be presumed to have contracted with reference to such risks and hazards.³ What risks are assumed and what are not, is, likewise, a matter to be determined upon the trial of each particular case.

When speaking of the foregoing two defenses as being the principal ones interposed in personal injury cases, it is, of course, meant affirmative defenses, and they are not meant to exclude the denial of all negligence as a matter of defense. If, of course, the defendant is absolutely free from any and all negligence, no matter how free of negligence the injured may have been at the time of his injury, there can be no recovery. There is, however, a tendency of the courts to vary these rules in cases where there are statutory regulations prescribed, which regulations have not been complied with by the person sought to be charged. At least, there is a difference of holding of courts in such cases in some respects, and to point out the particularity in which this difference arises, is the purpose of this discussion.

It seems to be well settled that a violation of statutory duties imposed upon a person constitutes negligence *per se*, and gives rise to a cause of action in favor of the injured regardless of any negligence on the part of the defendant other than the mere failure to comply with the provisions of the statute.⁴ As to that there is no difference of opinion among the courts. It seems to be a just rule, too, for when the community decides that the safety of its citizens is better secured by imposing res-

trictions or regulations upon any occupation, or act, a strict enforcement of them ought to be secured and if a violation of them is considered negligence *per se*, there will be fewer infractions than otherwise.

Since, then, a violation of statutory regulations is considered negligence *per se*, and rightly so, the question arises, shall the defendant in an action to recover damages, and one who has violated a statutory duty, be heard to urge the defenses ordinarily interposed in personal injury cases, namely, contributory negligence, and assumption of risk. Before discussing that question, however, it is interesting to note that while a violation of statutory regulations or requirements raises a presumption of negligence, yet if it can be shown that the accident or injury could not and would not have been prevented had the required regulation been complied with, then, and in that event a recovery in a civil suit will not be sustained.⁵ There is a tendency of some courts, however, to bar an inquiry into the question as to whether a compliance with the statute would or would not have prevented the accident or injury, most notably Tennessee⁶ and Texas.⁷ There is also a line of decisions indicating that where there has been a violation of statutory duty, a wrongdoer cannot take advantage of that violation in an action to recover damages for injuries sustained.⁸

(5) *Chrystal v. Troy & B. R. Co.*, 124 N. Y. 519; *East Tennessee V. & G. R. Co. v. Deaver*, 79 Ala. 216; *East Tennessee, V. & G. R. Co. v. Bayliss*, 75 Ala. 466, 77 Ala. 429, 54 Am. Rep. 69; *Alabama G. S. R. Co. v. Chapman*, 80 Ala. 615; *Mobile & G. R. Co. v. Caldwell*, 83 Ala. 196; *Nashville, C. & St. L. R. Co. v. Hembree*, 85 Ala. 481; *Leavenworth, T. & S. W. R. Co. v. Forbes*, 37 Kans. 445; *Atchison, T. & S. F. R. Co. v. Yates*, 21 Kans. 613; *Leebrick v. Republican Valley & S. W. R. Co.*, 41 Kans. 756.

(6) *Nashville & C. R. Co. v. Thomas*, 5 Heisk. 262; *Railroad Co. v. Walker*, 11 Heisk. 385; *Louisville & N. R. Co. v. Connor*, 9 Heisk. 20; *Hill v. Louisville & N. R. Co.*, 9 Heisk. 823; *Collins v. East Tennessee, V. & G. R. Co.*, 9 Heisk. 841.

(7) *Gulf, C. & S. F. R. Co. v. Hudson*, 77 Tex. 494.

(8) *Lonergan v. Illinois Cent. R. Co.* (Iowa), 17 L. R. A. 254; *O'Donnell v. Providence & W. R. Co.*, 6 L. R. A. 211; *Akers v. Chicago, St. P. M. & O. R. Co.* (Minn.), 60 Am. & Eng. R. R. Cas. 30; *Dillon v. Connecticut River R. Co.*, 154

(3) See cases cited Am. & Eng. Ency. of Law, vol. 20, p. 109; also Cent. Dig., vol. 34, col. 1101.

(4) Am. & Eng. Ency. of Law, vol. 20, p. 151.

A careful reading of the cases decided by courts of last resort will show that a person made a defendant in an action for damages will not, as a rule, be precluded from setting up as a defense contributory negligence, or assumption of risk, even if there has been a violation of statutory duty.⁹ A few quotations from decisions will illustrate this holding. In *Ford v. Chicago, R. I. & P. R. Co.*,¹⁰ the court said:

"It seems to us clear that section 1288 of the Code imposes certain duties on railroad companies; for a failure to perform them, resulting in damages, an action lies; and recovery may be had by proving the neglect or refusal, and that the party was injured as a result thereof. When this is done, a prima facie case is made, which, in the absence of testimony by the defendant, the statute provides shall be sufficient to warrant a recovery. The defendant, however, may establish any defense it may have including the contributory negligence of plaintiff's intestate. The statute provides what it shall be necessary for 'him' (the injured party) to prove. It does not directly or by fair implication eliminate any defense which is ordinarily available to the defendant."

The section of the Iowa Code referred to, made railroad companies liable for injuries caused by failure to maintain safe crossings at public highways. The case of *Reeves v. Dubuque & S. C. R. Co.*¹¹ construed the same provision and the court used this language:

"There is no dispute as to the facts. There is, and from the testimony can be,

no question that if he had looked for the train when he reached the cornfield adjacent to the track, he would have seen it approaching, and could have avoided the accident if he had been driving with that degree of care one should exercise when he knows he is near a railroad crossing. Knowing that the train was due, being familiar with the crossing and its surroundings, plaintiff proceeded to trot his team down the decline, going faster as he approached a place of known danger, and without making an effort to avoid injury. From all the facts we see no escape from the conclusion that plaintiff was not only negligent in such a way as to contribute directly to the injury of which he now complains, but he seems to have been entirely wanting in the exercise of the slightest care for his safety. There are no facts in this case which remove it from the application of the general rule as to travelers about to cross a railway track, requiring them to stop, to look, or to listen for approaching trains. There was no necessity for driving rapidly to the track; there was nothing to have prevented stopping and looking at a reasonable distance from the track; nothing to divert his attention. It was a plain case of gross negligence, which produced the damage of which plaintiff complains."

In *Ryan v. Long Island R. Co.*,¹² the facts were these: Plaintiff's decedent who was employed by the defendant as a brakeman, was knocked from the top of a car by a low bridge on a very dark night, and was killed. No warning signals were displayed on the bridge as required by law. Signals were displayed by bridges in close proximity to the one in question. It appeared that the decedent had traveled past such bridges for several months before the accident. It was held that the plaintiff had assumed the risk, and the defendant therefore was not liable. In another New York case,¹³ it was decided that the law imposing a penalty on the owners of factories in which women were employed for failure to cover

Mass. 478; *Savannah & W. R. Co. v. Meadors*, 95 Ala. 137; *Atlanta & C. Air Line R. Co. v. Gravitt* (Ga.), 26 L. R. A. 553; *Bell v. Hannibal & St. J. R. Co.*, 72 Mo. 50; *Holmes v. Central R. & Bkg. Co.*, 37 Ga. 593; *Condran v. Chicago, M. and St. P. R. Co.*, 67 Fed. Rep. 522.

(9) *Kroy v. Chicago, R. I. & P. R. Co.*, 32 Iowa, 360; *Beaucoup Coal Co. v. Cooper*, 12 Ill. App. 373; *Meeks v. S. P. R. Co.*, 52 Calif. 604; *McKelvey v. Burlington, C. R. & N. Co.*, 84 Iowa, 455; *Spiva v. Osage Coal & Min. Co.*, 88 Mo. 68; *Reynolds v. Hindman*, 32 Iowa, 146; *Whittier v. Chicago, M. & St. P. R. Co.*, 24 Minn., 394. See long list of cases cited in note to *Shellenberger v. Ranson*, 25 L. R. A. 572.

(10) (Iowa), 24 L. R. A. 657.

(11) (Iowa), 60 N. W. Rep. 243.

(12) 51 Hun. 607, 4 N. Y. Supp. 381.

(13) *Knisley v. Pratt*, 144 N. Y. 372, 42 N. E. Rep. 986, 32 L. R. A. 367.

cog-wheels, did not prevent a woman from assuming the obvious risks from uncovered cogwheels.

All of the statutes construed in the cases cited in support of the preceding paragraph are for the protection of property rights, or the person of adults. There is a tendency to vary the rule laid down in those cases when it comes to the construction of statutes prohibiting the employment of children in certain harmful or dangerous occupations. This tendency is exemplified in the typical case of *Queen v. Dayton Coal & I. Co., Ltd.*¹⁴ That was an action to recover damages for personal injuries received by a boy, ten years of age, who had been employed by the defendant company in violation of an act containing the following provision:

"And no boy under twelve years of age shall work or enter any mine, and proof must be given of his age, by certificate or otherwise, before he shall be employed." A violation of the act was made a misdemeanor punishable by fine, or imprisonment, or both, at the discretion of the court. In discussing the point as to whether or not the employment of the plaintiff constituted negligence on the part of the defendant, the court said:

"So we think the employment of this minor in violation of the provision of the statute in question was an act of negligence on the part of the defendant, and, a casual connection between the employment and the injuries sustained by the boy being shown, a case of liability is made out. Of course, we do not hold that if the boy had died of organic disease of the heart, or from a stroke of paralysis, or from some cause wholly disconnected with his employment, the company would have been liable in damages simply on account of the employment in violation of the statute. But we do hold that the breach of the statute is actionable negligence whenever it is shown that the injuries were sustained in consequence of the employment. This view of the case does not preclude the defense of

contributory negligence on the part of the plaintiff." And while it is here held that the defense of contributory negligence can be interposed, yet the court continues, and points out that such "contributory negligence on the part of a minor is to be measured by his age and his ability to discern and appreciate circumstances of danger. He is not chargeable with the same degree of care as an experienced adult, but is only required to exercise such prudence as one of his age may be expected to possess. The court further upheld the refusal of the lower tribunal to instruct the jury that it was gross negligence to employ a minor in violation of the statute.

In the case of *Schmidt v. Printing Business of Edwin C. Bruen*,¹⁵ which was an action to recover damages for injuries sustained by a minor employed in violation of statute, the New York court held that there was no absolute liability on the part of the person so employing a minor, and that the contributory negligence of the minor so employed could be interposed as a defense in an action for damages for injuries sustained. Judge Crane, speaking for the court, says: "But whatever may be proved for or against him, the liability is not absolute by the employment of a child under age. His negligence in employing the child is the question for the jury. As in this case the court charged, in view of all the circumstances, that the master was presumed to know the age of the plaintiff when he was employed, and called the attention of the jury to the means by which he could have ascertained his exact age—in fact stated to them that the defendant was bound to know that the plaintiff was under sixteen years of age, which was a broader charge than the plaintiff was entitled to—he certainly has no just complaint because the jury decided against him, either on questions of negligence or contributory negligence.

The facts in the case of *Shellaberger v. Fisher*,¹⁶ were substantially as follows:

(14) (Tenn.), 30 L. R. A. 82.

(15) 106 N. Y. Supp. 445.

(16) 142 Fed. Rep. 937.

The defendant owned an apartment house in which there was an automatic, pushbutton, electrical passenger elevator. The plaintiff, a child of about six years, was injured in ascending from the first to the second floor. A city ordinance declared it to be the duty of every person who used or operated an elevator, except hand-power elevators, to employ a competent person over sixteen years of age to operate it, and a violation was declared a misdemeanor. United States Circuit Judge Sanborn, in writing the opinion of the court, said: "No one but a child of tender years could fail to know and appreciate the risk of such a contact, or could fail to be guilty of contributory negligence if he permitted himself to suffer from it. Therefore, the failure to employ an operator for an elevator of this character is not actionable by any passenger except a child of years so tender that he cannot know and appreciate the risk of his contact with the door or side of the shaft when the car is moving. The case in hand falls under an exception to the general rule because the ordinance of Kansas City imposed the duty to employ an operator upon the defendant and made her failure to do so evidence of actionable negligence for the consideration of the jury"¹⁷ and because the plaintiff was too young to appreciate the risk she ran and the law in the absence of the ordinance charged the defendant with the duty to exercise reasonable care to protect such a child from any obvious danger to which the defendant exposed her. The doctrine of assumption of risk is not applicable to this case because the relation of master and servant did not exist between the parties and the child was not guilty of contributory negligence because she did not possess the maturity or capacity to know the danger or to appreciate the risk to which she was exposed and therefore she was not chargeable with any legal duty to avoid it."

From the foregoing case it will be seen

that assumption of risk or contributory negligence does not constitute a defense when the injured is of immature years and incapable of fully appreciating danger. Consequently, it seems reasonable that whenever the legislature fixes the minimum age at which children are to be employed in dangerous occupations, that one who employs them during the prohibitory age, and an injury results, he should not be heard to say that the child assumed the risk, or that it contributed by its own act toward the injury. Right in point is the case of *Lenahan v. Pittston Coal Mining Co.*¹⁸ arising in Pennsylvania. The facts in that case, as well as the rule of law governing the decision, can best be indicated by quoting at some length the court's own language:

"The act of June 2, 1891 (P. L. 176), which, as its title declares, was intended to protect the health and safety of persons employed in and about the anthracite coal mines of Pennsylvania, and to preserve the property connected therewith, provides (section 8) that 'no person under fifteen years of age shall be appointed to oil the machinery and no person shall oil dangerous parts of such machinery, while it is in motion.' The boy, Munley, was fourteen years, four months, and three days old at the time the accident occurred. At the trial the learned court below directed a compulsory nonsuit to be entered, which, on motion made, he refused to take off on the ground that the boy was guilty of contributory negligence in attempting to oil dangerous parts of the machinery while in motion, which was in violation of the statute, and therefore negligent. This would be the correct rule if the injured boy had the right under the law to engage in the employment which occasioned the injury. The learned trial judge took the view that the boy, being over fourteen years of age, was presumed under the common-law rule to have sufficient capacity to be sensible of danger and to have the power to avoid it, and that such presumption had not been

(17) Citing: *Hayes v. Mich. Cent. R. Co.*, 111 U. S. 228, 236, 241; *Grand Trunk Ry. Co. v. Ives*, 144 U. S. 408, 419; *N. P. R. Co. v. Sullivan*, 53 Fed. Rep. 319, 321, 324.

(18) 67 Atl. Rep. 642.

overcome by the evidence produced at the trial. The exact question raised by this appeal is whether this common-law rule was modified or changed by the statutory regulation. The injured boy was under fifteen years of age, and, if the appellee company employed him for the purpose of oiling machinery, it did so in violation of the statute. Is it, therefore, in position to set up in this case the rule which presumes a boy over fourteen to be capable of appreciating danger so as to apply the rule of contributory negligence to his acts, when the legislature in express terms provided that an employer shall not engage a person under the age of fifteen years to perform this dangerous work? After full consideration we are unanimously of the opinion that the legislature, under its police power, could fix an age limit below which boys should not be employed, and, when the age limit was so fixed, an employer who violates the act by engaging a boy under the statutory age does so at his own risk, and, if the boy is injured while engaged in the performance of the prohibited duties for which he was employed, his employer will be liable in damages for injuries thus sustained. This rule is founded on the principle that when the legislature definitely established an age limit under which children should not be employed, as it had the power to do, the intention was to declare that a child so employed did not have the mature judgment, experience, and discretion necessary to engage in that dangerous kind of work. A boy employed in violation of the statute is not chargeable with contributory negligence or with having assumed the risks of employment in such occupation. There can be no question that this statute was intended as a protection to the employees, and its object was to prevent children under the age of fifteen years from being employed in and around the anthracite coal mines in the dangerous kind of work designated in the act, and it should be given a construction to best effectuate the purpose of its enactment. This exact question has not been before our courts, but it has been passed upon by the courts of many other jurisdic-

tions, and, so far as we are informed, the rule hereinbefore stated has been uniformly followed."

Hence, it will be seen that in actions to recover damages of a person who has violated a statutory duty, the decisions of the court seem to indicate the following: First: A violation of a statutory duty is negligence *per se*. Second: In some jurisdictions it must be shown that a compliance with the statutory requirement would have prevented the injury. Third: A violation of statutory duty cannot be invoked by a wrongdoer. Fourth: As a general rule assumption of risk and contributory negligence may be interposed as defenses. Fifth: When a statute prohibits the employment of children in certain dangerous occupations, there is a tendency to exclude assumption of risk and contributory negligence as matters of defense.

W. F. MEIER.

Spokane, Washington.

ADOPTION — INHERITANCE BY ADOPTED CHILDREN.

APPEAL OF WOODWARD.

Supreme Court of Errors of Connecticut.
August 3, 1908.

Under the statutes of distribution, the court, on the mere fact appearing that an intestate died leaving a widow and a sister, but no issue or parent, was required to distribute a portion of the estate to the sister, but on it further appearing that the intestate had legally adopted a child surviving him, the child must be awarded such distributive share as if born a lawful child of the intestate.

The power to adopt minor children is a creation of the statute unknown to the common law, and the statutory mode prescribed is the measure of the power, so that an adoption is invalid unless made pursuant to the statute.

A decree of adoption, rendered pursuant to a statute regulating the matter, and which gives to the adopted child the capacity to inherit, is not void because the parents of the child were not served with notice to appear, and did not appear nor consent to the adoption, for which cause the parents might contest the validity of the decree so far as it affected their legal rights as parents, and the child, after the death of the person adopting him, is entitled to a share in his personal estate under the statutes of distribution, as against the right of a sister of such person.

John O. Noxon, a resident of Meriden, died November 28, 1905. Thereupon his widow,

Martha C. Noxon, petitioned the court of probate that letters of administration be granted to the Meriden Trust & Safe Deposit Company, representing that her husband died, leaving her, his widow, and as his only heir at law and next of kin, his sister, Mary L. Woodward, a resident of Elizabeth, N. J., and leaving no will. Letters of administration were granted to said corporation. On May 6, 1907, the court of probate passed an order that Martha C. Noxon, widow, then (at the date of the order) deceased, and Elizabeth E. B. Potter, of San Bernardino, Cal., were heirs at law, or their representatives and "therefore ordered that said estate be distributed to and among said heirs according to law," and appointed three distributors to distribute said estate.

On June 26, 1907, the said Mary L. Woodward made application to the court of probate, alleging that she is heir at law and next of kin of said John O. Noxon. On the same day (June 26, 1907) the court of probate passed an order allowing said appeal. Upon the entry of said appeal the appellant, Mary L. Woodward, appeared, and the said administrator appeared as appellee.

The pleadings, in so far as they affect the questions decided upon the appeal, are substantially as follows: The reasons of appeal state that the appellant is a sister of John O. Noxon, the deceased, and that the deceased died intestate, leaving a widow, but no children or the representatives of children. The attorneys for the appellees filed an answer to the reasons of appeal, admitting that the appellant is a sister of the intestate, admitting that the intestate died leaving a widow, and denying that the intestate left no children or representatives of children, and alleging, as a special defense, that on November 6, 1863, the said John O. Noxon and his wife, the said Martha C. Noxon, by proceedings duly had, and a decree of adoption duly made and entered in the county court in and for Milwaukee county, in the state of Wisconsin, adopted a minor child, named Elizabeth E. Burton, and that the Elizabeth E. Burton so adopted is the Elizabeth E. B. Potter mentioned in the order of distribution, and that, by virtue of said decree of adoption and the law of Wisconsin, said Elizabeth E. B. Potter is, for the purposes of succession and inheritance, the child of John O. Noxon, and as such child entitled to inherit his property in this state under the laws of this state. The judgment of the trial court finds the issues for the appellee, and thereupon adjudges that the orders of the court of probate appealed from be confirmed.

The appellee, for the purpose of proving the alleged adoption, produced a copy of the record

of the adoption proceedings in the Wisconsin court. This record consists of, first, the petition addressed to the county judge of the county of Milwaukee. The petition represents (1) that the petitioners are, and for four years last past have been, inhabitants of said Milwaukee; (2) that Elizabeth E. Burton, an infant two years of age, the child of Henry E. and Ellen J. Burton, his wife (the said Henry being a brother of the petitioner Martha C. Noxon), has resided with the petitioners for more than seven months last past, during which time the child has been wholly dependent on the petitioners for support and has received no support from its parents; (3) that the child was brought into Wisconsin by its parents some time before the month of March last, and both parents have now left the state, and have not resided in the state for more than six months last past; (4) that the petitioners are now wholly ignorant of the whereabouts of said Henry or Ellen Burton, and when last heard from they were living separate, and neither pretending to make any provision for said child; (5) that the child has no legal guardian and no kindred within the state, except the petitioners; (6) that the petitioners are fit to bring up the child suitably, and deem it fit and proper that it should be adopted by them—they therefore petition for leave to adopt the child, and that an order may be made (upon proper consent being given) that such child be deemed, for all legal purposes, the child of the petitioners, and that some suitable person be appointed to act in the proceedings as the next friend of such child. This petition was verified by oath of the signers before a notary public. Second. The order appointing a next friend. The order recites that the parents of the said child reside without the state of Wisconsin, and that said child has no legal guardian and no kindred within the state except the petitioners, and thereupon orders that Oliver P. Wolcott of Milwaukee, be appointed to act as the next friend of Elizabeth E. Burton, and to give or withhold his consent to her adoption. Third. The order purporting to change the status. This order is as follows: "On reading and filing the petition of John O. Noxon and Martha C. Noxon, his wife, of the city and county of Milwaukee, state of Wisconsin, praying for leave to adopt Elizabeth E. Burton, the child of Henry E. Burton and Ellen J. Burton, his wife, and Oliver P. Wolcott having been appointed by this court to act as the next friend of the said child, the parents of the said child being nonresidents of the state of Wisconsin, and the said Wolcott having given his consent in writing to the said adoption, and this court having become satisfied of the identity and re-

lationship of the said parties, and that the petitioners are of sufficient ability to bring up the child and furnish suitable nurture and education, having reference to the degree and condition of its parents, and that it is fit and proper that such adoption shall take effect: It is therefore ordered and decreed that, from and after the date of this order, such child shall be deemed and taken, to all legal intents and purposes, to be the child of the said petitioners, as by the statute in such case made and provided. In testimony whereof I have hereunto set my hand, and affixed the seal of the county court of said county this 6th day of November, A. D. 1863."

"Section 1. Any inhabitant of this state may petition the county judge, in the county he or she may reside, for leave to adopt a child not his or her own by birth.

"Sec. 2. If both or either of the parents of such child shall be living, they, or the survivor of them, as the case may be, shall consent to such adoption; if neither parent be living, such consent may be given by the legal guardian of such child; if there be no legal guardian, nor father nor mother, the next of kin of such child within the state may give such consent; and if there be no such next of kin, the county judge may appoint some discreet and suitable person to act in the proceedings as the next friend of such child, and give or withhold such consent.

"Sec. 5. If upon such petition, so presented and consented unto, as aforesaid, the county judge shall be satisfied of the identity and relations of the persons, and that of the petitioner, or in case of husband and wife, that the petitioners are of sufficient ability to bring up the child, and furnish suitable nurture and education, having reference to the degree and condition of its parents, and that it is fit and proper that such adoption shall take effect, he shall make an order setting forth the said facts, and ordering that from and after the date of the order, such child should be deemed and taken to all legal intents and purposes, the child of the petitioner or petitioners."

In 1862 section 2 of chapter 49 was amended so as to read as follows:

"If both or either of the parents of such child shall be living they or the survivor of them as the case may be, providing they live in this state, shall consent to such adoption; but if they do not live in this state or are gone to parts unknown or if neither parent be living then such consent may be given by the legal guardian of such child. If there be no legal guardian the next of kin of such child within the state may give such consent;

and if there be no such next of kin the county judge may appoint some discreet and suitable person to act in the proceedings as the next friend of such child and give or withhold such consent." Gen. Laws Wis. 1862, p. 153, c. 253.

HAMERSLEY, J. (after stating the facts as above): The statute directs the probate court, when the intestate dies leaving no children or any legal representatives of them, to distribute a prescribed portion of the estate to the widow, and the remainder to the parents of the intestate, if any, and if there be no parent, then equally to the brothers and sisters of the whole blood. It appeared to the court that the intestate died leaving a widow, leaving no issue, and no parents, and that the appellant was his sister of the whole blood. Upon these facts alone it was the duty of the court to distribute a portion of the estate to the appellant. But it further appeared to the court, that, on November 6, 1863, a county judge of the county of Milwaukee, in the state of Wisconsin, upon the petition of the intestate and his wife, passed a decree purporting to give, by authority of the Wisconsin law, to Elizabeth E. Burton, then an infant two years and seven months of age (being the Elizabeth E. B. Potter to whom the court of probate made distribution), the same capacity of inheritance and succession she would have if she had been born the lawful child of the petitioners. This action of the Wisconsin court is called by the law of that state, and somewhat similar action authorized by the law of this state is called by our law, an "adoption."

"Adoption" was never used to express the peculiar incidents of such action prior to 1846, when the states of the United States, in which the common law of England is followed, began to enact statutes similar to that of Wisconsin and to that of our own state. Before that time the meaning of adoption as expressing a legal status was that derived from the Roman law. The peculiar status or relationship arising from adoption known to Roman law is of a kind unknown to the law of England, and of a kind unknown to the law of this state, certainly until 1864, when the statute referred to was passed. Dicey on Conflict of Laws, p. 475. It may aid the consideration of questions arising under such statutes to note the distinction between adoption as a status existing under the Roman law and the statutory status which, since 1846, has been established by the legislatures of this and some other states retaining the English common law.

Roman adoption, or the act by which the relations of paternity and filiation are recog-

nized as legally existing between persons not so related by nature, derived its original significance mainly from the existence of the *patria potestas*, which was peculiar to Roman citizenship, and involved, as between parent and child, relations of paternity and filiation peculiar to Roman law. A child born in lawful marriage was in the power of its father. That power includes, not only the child born in wedlock, but also the child born to his son, and the one born to his son; that is, your son, grandson, great-grandson, and other descendants are equally in your power. Just. I, ix, Secs. 1-3. Roman adoption, until the legislation of Justinian, was the act by which an ascendant transferred his descendant, who was in his power, to the power of another ascendant, and thereupon the person so transferred was in the power of the adopting ascendant, as well as his actual children. The act was accomplished through prescribed formalities, under authority of a magistrate. A person not in the power of an ascendant, but free from power, might be adopted by the form of adoption called "arrogation." In such case the adopter formally consented that the one to be adopted should become his lawful son, and the one to be adopted consented thereto. This change of relation was accomplished originally by the authority of the people assembled in the *Comitia*, and later was established by an imperial rescript. Under either form the person adopted became, in early Roman law, subject to the *patria potestas* which a Roman father possessed over his descendants. See Just. Inst. I, tit. 2; Code VIII, 48, 10.

The *patria potestas*, which controlled the original meaning of Roman adoption, does not exist in this state, nor in any state organized on the principles of the English law. It is inconsistent with our fundamental social conditions. With us every man who has reached his majority is free from power. A father's power extends to his children, but not to his other descendants, and extends to his children only during the minority of each. The difference between a society like ours, based on the principle that each member on reaching his majority is his own master, a responsible unit, with control of each of his own children until and only until the child becomes of age, and a society based on the principle of the *patria potestas* is organic. With us the legal rights and duties existing between parent and child exist only during the minority of the child. After that, the duties arising from the natural relation are not legal but moral, unless by force of statute some specific legal duty is created.

Another peculiarity of the Roman law, mate-

rially affecting the meaning and operation of Roman adoption, was the principle which recognized, in children in the power of their father, a quasi interest or ownership in his property during his life. Just. II, xix, Sec. 3. And so the mere fact of adoption made the adopted person, thus subjected to the power of the adopted father, an heir of the patrimony, and as such entitled to succeed to the inheritance in case of intestacy. Just. III, i, Secs. 1, 2. With us a child has no interest in his father's property, which, in case of intestacy, is taken possession of, by the law, and distributed among those related to the intestate by blood according to prescribed rules. The statutes, differing widely in their terms, which have been passed in recent years for the purpose of establishing between a minor and one not his parent the legal obligations and duties attached to the natural relation of parent and child, as well as for conferring upon any person a capacity, more or less limited, of succeeding to the property of one not his parent, must be understood and applied in accordance with the terms of each statute, in view of our own conditions, and their meaning and effect are not necessarily controlled by the analogies of a Roman adoption.

What the Wisconsin law was at the time of the decree in question is specifically found by the superior court. This finding is not in accord with the fact; the act of 1862 having apparently been inadvertently overlooked, both by court and counsel. But, under Gen. St. 1902, Sec. 697, all courts are to take judicial notice of the public statutes of the several states of the United States, as printed by authority, and it is therefore our duty to consider the statutes of Wisconsin as they really were. *Fourth National Bank v. Francklyn*, 120 U. S. 747, 7 Sup. Ct., 757, 30 L. Ed. 825. Their provisions in 1863 were substantially as follows: Any inhabitant of the state could petition a county judge for leave to adopt a child not his own by birth (the petitioner and child residing in that county). Such petition must be accompanied or followed by a consent to the adoption (1) of the parent of the child, if alive and a resident of the state of Wisconsin, (2) if no parent be living, or, if the living parent is a nonresident of Wisconsin, of the child's legal guardian or next of kin in the state, or some suitable person appointed by the judge to act as next friend of the child, and give or withhold such consent. These jurisdictional facts existing, the county judge is empowered to judicially find that the petitioner is able to bring up and educate the child, and that it is fit and proper that such adoption

shall take effect, and upon finding these facts, is empowered to decree the adoption of such child; that is, that such child shall be deemed and taken, to all legal intents and purposes, as the child of the petitioner. The meaning and effect of the statutory adoption and decree is defined by the statute as follows: (1) As affecting the legal rights and duties of parent and child, the adopted child shall be deemed, for the purposes of custody of his person, of power to enforce obedience, and other legal consequences attached to the natural relation of parent and child, as a child of the adopting parent born in lawful wedlock; the natural parent of the child being, by such decree, deprived of all legal rights as respects such child and the child being freed from all legal obligations as respects his natural parent. (2) As affecting the laws of inheritance and distribution and the capacity of the child to take property in pursuance of such laws, the adopted child shall be deemed and taken, for the purposes of inheritance and succession by him, to be the child of his adopting parent.

It is true, as claimed, that courts, in applying statutes of this kind, have held that the power to so adopt minor children is a creation of the statute unknown to the common law; that the statutory mode prescribed is the measure of the power, and that an adoption is invalid unless made in pursuance of these essential requirements of the statute. In the *Matter of Thorne's Will*, 155 N. Y. 140, 49 N. E. 661; *In re Johnson*, 98 Cal. 531, 33 Pac. 460, 21 L. R. A. 380; *Shearer v. Weaver*, 56 Iowa, 578, 9 N. W. 907; *Tyler v. Reynolds*, 53 Iowa, 146, 4 N. W. 902; *Long v. Hewitt*, 44 Iowa, 363; *In re Humphrey*, 137 Mass. 84; *In re Estate of McCormick*, 108 Wis. 234, 8 N. W. 148, 81 Am. St. Rep. 890; *Furgeson v. Jones*, 17 Or. 204, 20 Pac. 842, 3 L. R. A. 620, 11 Am. St. Rep. 808; *Watts v. Dull*, 188 Ill. 86, 56 N. E. 303, 75 Am. St. Rep. 141; *Taber v. Douglass*, 101 Me. 363, 64 Atl. 65. But the claim that this principle applied to the present case—that the record of the Wisconsin court shows upon its face that in the act of adoption the court did not follow the requirements of the statute and did that which by the Wisconsin law it was not empowered to do—is not sustained. The Wisconsin law, namely, chapter 49 of the Revision of 1858, with its second section amended by the act of 1862, was in force scarcely two years when it was deemed by the legislature inadequate, and was materially altered. Whether or not the alteration was made because the legislature deemed that law too arbitrary, it was the law when this decree was passed, and the decree is plainly within the jurisdiction conferred by the law.

A further claim is made that, notwithstanding the Wisconsin court acted within its jurisdiction, yet it appears that the parents of the adopted child were living at the time of the decree, and that they had no notice, by personal service or otherwise, to appear to be heard, and therefore the decree is upon its face void, by force of the settled principle that a personal judgment cannot be enforced against a defendant who neither appeared nor had legal notice to appear in the action. We do not think that this principle can be applied so as to render the decree, in so far as it affects the capacity of the infant to share in the distribution of the estate of his intestate, void upon its face. A father or parent has certain legal rights in respect to his children during minority. But these rights are not absolute rights; they may be forfeited by his own conduct; they may be modified or suspended against his will by action of the court; they may, to a certain extent, be transferred by agreement to another—but they cannot be destroyed as between himself and his child, except by force of statute. *Johnson v. Terry*, 34 Conn. 259, 263. If the parents of Elizabeth Burton had a right to contest the validity of this decree in so far as it deprived them of their legal parental rights, it does not follow necessarily that, after those rights have terminated with the majority of their child, the decree giving to the infant a statutory capacity of inheritance from a stranger, made in pursuance of jurisdiction conferred, and in the manner prescribed by statute, must be held void because the child's parents were not served with notice to appear, and did not in fact appear, and did not in fact consent to the action of the court. We are unable to affirm, upon the case as presented, that the decree of the Wisconsin court, authorized by statute and rendered in pursuance of the requirements of the statute, giving to Elizabeth Burton the defined statutory status as an adopted child of the intestate for the purposes of inheritance and succession, is void because the parents of the child might have successfully contested the validity of the decree in so far as it affected their legal rights as parents.

A still further claim is made that, on general principles of jurisprudence, the court in Wisconsin was without jurisdiction to change the status of Elizabeth E. Burton, because neither her domicile, nor that of her natural parents, was in that state. The petition for her adoption stated that John O. Noxon and his wife were inhabitants of Wisconsin, that Elizabeth E. Burton was a child between two and three years of age, who had been brought into the state by her parents more than eight months before, and for the last preceding sev-

en months had inhabited and resided in the family of the petitioner in Milwaukee, and that her parents had left the state more than six months previously, and not since resided therein, being at the date of the petition in parts unknown. Assuming, as we should, in support of the judgment, that these allegations were found true by the county judge, they fall short of showing that the child had gained for itself a Wisconsin domicile.

The state, however, may create the status of adoption in the case of an infant actually within its limits, and for that purpose it is only necessary that the petition of adoption should be brought by a domiciled inhabitant of the state in which it is preferred, when the child is within its territorial limits and in need of its protection, provided this protection can be reasonably afforded by transferring the child to the charge of him who seeks to assume toward it the responsibilities of a parent. *Stearns v. Allen*, 183 Mass. 404, 67 N. E. 349, 97 Am. St. Rep. 441; *Minor on Conflict of Laws*, 322. Wisconsin had a statute authorizing such a proceeding, although neither the child nor its natural parents had a domicile there. The effect of an adoption decreed under its provisions, as respects the natural parents, it is not necessary, for the purposes of this cause, to consider. See *Schlitz v. Roenitz*, 86 Wis. 31, 42, 56 N. W. 194, 21 L. R. A. 483, 39 Am. St. Rep. 873.

There is nothing in the policy of this state, in reference to the relation of parent and child, which could interfere with our giving effect to the Wisconsin decree, as respects the rights of the petitioners for the adoption, after they transferred their domicile to Connecticut, or of those claiming under them. We have statutes of a similar nature, and fully recognize the status of an adopted child. *Ross v. Ross*, 129 Mass. 243, 267, 37 Am. Rep. 321. Those who have once legally made such an adoption cannot shake off the relation by a change of domicile. Whether the child adopted, on reaching full age, could reclaim its original domicile is a question not raised by the facts before us. To John O. Noxon, therefore, after his removal to this state, as well as while an inhabitant of Wisconsin, Elizabeth E. Burton, now Mrs. Potter, stood in the position of a child born in lawful wedlock.

There is no error. In this opinion the other judges concurred.

NOTE.—Shall Statutes Conferring the Right of Adoption be Strictly or Liberally Construed?—While it has been said in a number of cases that statutes conferring the right of adoption are wholly repugnant to the principles of the common law, we desire to note the fact that every

court which has had occasion to construe the constitutionality of these widely different statutes has upheld them without even a suggestion of doubt. Indeed, if it were profitable, we might undertake to show that while adoption was unknown to the common law it is not repugnant to its principles. English courts of equity, in many of their decisions, have declared the principle that the state as *parens patriae* has absolute supervising control over the children of the realm, whose welfare is ever to be given paramount consideration. It is this broad principle of English law which justifies the Juvenile Court Acts (61 Cent. L. J. 101) and, to our mind, also the statutes conferring the right of adoption. Such statutes, at least, in view of the fact that they assume, to some extent, to perform the duty of every civilized government as *parens patriae* to find a home and a protector for every child within its borders, should be liberally construed.

Failure to recognize this great principle and purpose of every civilized government which such statutes serve to advance and in blind reliance upon the unfortunately phrased rule that such statutes are in derogation of the common law and repugnant to its principles, many courts have held that an absolutely strict compliance with the provisions of such statutes is necessary in order to create a valid adoption. In *re Jessup's Estate*, 81 Cal. 408; *Furgeson v. Jones*, 17 Oreg. 204, 11 Am. St. Rep. 808; *Wallace v. Rappleye*, 103 Ill. 229; *Johnson v. Terry*, 34 Conn. 259; *Lupie v. Winans*, 37 N. J. Eq. 245; *Sarazin v. Railway Co.*, 153 Mo. 479; *Taylor v. Deserve*, 81 Tex. 246; *Long v. Hewitt*, 44 Iowa, 363; *Watts v. Dull*, 184 Ill. 86. A substantial compliance with the terms of such statutes is all that is called for by other courts. *Abney v. De Loach*, 84 Ala. 393; *Bancroft v. Bancroft*, 53 Vt. 9; In *re Williams Estate*, 102 Cal. 70; *Fosburgh v. Rogers*, 114 Mo. 122; *Cofer v. Scroggins*, 98 Ala. 342; *Matter of Johnson*, 98 Cal. 531; *Clarkson v. Hatton*, 143 Mo. 47, 39 L. R. A. 748; *Nugent v. Powell*, 4 Wyo. 173, 33 Pac. 23, 62 Am. St. Rep. 17, 20 L. R. A. 199.

To evidence how diametrically opposed to each other are those decisions which divide on the question of "strict" or "substantial" construction of adoption statutes, take the two cases of *Watts v. Dull*, 184 Ill. 86 and *Nugent v. Powell*, 4 Wyo. 173. In both cases the question was as to the validity of an adoption where a parent who had abandoned his child had not been properly notified. It was held in the Illinois case that the slightest failure to follow the statute would invalidate the adoption on collateral attack. The court said: "As against the adopted child, the statute should be strictly construed, because it is in derogation of the general law of inheritance, which is founded on natural relationship, and is a rule of succession according to nature, which has prevailed from time immemorial." The technicality in this case which invalidated the adoption was the failure to obtain consent of the mother of the child. The statute provided that such consent was unnecessary where either parent had deserted or abandoned their child for one year. The petitioner alleged the mother's desertion but did not state that it was for one year. The decree also declared the mother's desertion as a reason for not obtaining her consent. The court refused to extend to the court below the benefit of the rule that jurisdiction will be presumed where

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1. **Abortion**—Indictment and Information.—An indictment for attempt to procure abortion held not required to state the drug or instrument, or how administered, or how used.—*Thomas v. State, Ala.*, 47 So. Rep. 257.

2. **Acknowledgment**—Time for Making Certificate.—The officer taking an acknowledgment to a mortgage held to have no power to attach the certificate, after delivery of the mortgage, without recalling the parties.—*Alford v. First Nat. Bank, Ala.*, 47 So. Rep. 230.

3. **Adverse Possession**—Prescription.—The prescription of five years does not cure nullities as absolute as the want of payment of any price at all and the disposition of a minor's property contrary to the law.—*Gary v. Landry, La.*, 47 So. Rep. 124.

4. **Appeal and Error**—Bill of Exceptions.—Proceedings for amendment of bill of exceptions held to receive no additional validity from leave granted by the Court of Appeals, in which the appeal, of which it had no jurisdiction, was pending.—*Reed v. Colp, Mo.*, 112 S. W. Rep. 255.

5. **Harmless Error**—A defeated party cannot complain because the court directed a verdict against him for a smaller sum than the successful party was entitled to.—*Armstrong v. National Life Ins. Co., Tex.*, 112 S. W. Rep. 327.

6. **Matters Not Presented in Trial Court**—Where there is no objection in the trial court to the admission of a physician's testimony on the ground of privilege, such objection cannot be considered on appeal.—*In re More's Estate, Mich.*, 117 N. W. Rep. 329.

7. **Review**—Whether the prima facie showing of payment of a debt made by the debtor's executing his note has been rebutted is a question for the trial court, with which the court on appeal will not interfere.—*Beach v. Huntsman, Ind.*, 85 N. E. Rep. 523.

8. **Bankruptcy**—Acts of Bankruptcy.—The payment of a debt of three dollars by a mercan-

tile firm is not such a substantial preference as will constitute an act of bankruptcy sufficient of itself to sustain an involuntary petition.—*In re Stovall Grocery Co., U. S. D. C., N. D. Ga.*, 161 Fed. Rep. 882.

9. **Adverse Claim to Property**—The fact that at a meeting of the creditors of a bankrupt to consider an offer of composition one having title to certain property then in possession of the trustee did not mention his right will not estop him to assert the same after the composition has been rejected.—*In re Loll, U. S. D. C., D. Conn.*, 162 Fed. Rep. 79.

10. **Finding of Referee**—The finding of a referee in bankruptcy as to the validity of a claim where it depends on questions of fact and the credibility of witnesses examined before him will not be overruled by the court except on convincing proof that he was wrong in his conclusions.—*In re Hatem, U. S. D. C., E. D. N. Car.*, 161 Fed. Rep. 895.

11. **Jurisdiction**—Courts of bankruptcy have no jurisdiction outside of their territorial limits as prescribed by the act of Congress creating them.—*In re Steele, U. S. D. C., N. D. Ala.*, 161 Fed. Rep. 886.

12. **Liability of Attorney**—A bankrupt's confidential attorney held to have participated in a secreting of funds of the bankrupt, and was properly required to account, for investments made by him of the funds, to the bankrupt's trustee.—*Clay v. Waters, U. S. C. C. of App., Eighth Circuit*, 161 Fed. Rep. 815.

13. **Reference**—Where the president and managing director of a corporation bought certain claims against it for its benefit, he was accountable to the corporation's trustee in bankruptcy for any profits made by him thereon, but was not chargeable with the full amount of the claims as an unlawful preference.—*Atherton v. Emerson, Mass.*, 85 N. E. Rep. 530.

14. **Preferences**—A transfer by way of mortgage or pledge given to secure an antecedent debt within four months prior to the debtor's bankruptcy, and when he is insolvent, is void, although the creditor did not know nor have reasonable cause to believe he was then insolvent.—*In re W. W. Mills Co., U. S. D. C., E. D. N. Car.*, 162 Fed. Rep. 42.

15. **Secured Claims**—Assignments of claims against the United States as collateral security by a bankrupt held void under Rev. St. sec. 3477 (U. S. Comp. St. 1901, p. 2320).—*National Bank of Commerce of Seattle v. Downie, U. S. C. C. of App., Ninth Circuit*, 161 Fed. Rep. 839.

16. **Title Acquired by Trustee**—Where the bankrupt's title is defeasible, such title only vests in the trustee, and on confirmation of a composition with bankrupt's creditors and dismissal of the bankruptcy proceedings the same defeasible title reverts to the bankrupt.—*Zavelo v. Cohen Bros., Ala.*, 47 So. Rep. 292.

17. **Banks and Banking**—Claims Due Insolvent Bank.—A correspondent bank indebted to an insolvent bank on open account is entitled to apply the amount thereof on an indebtedness due to the correspondent bank from the insolvent bank.—*Brown v. Sheldon State Bank, Iowa*, 117 N. W. Rep. 289.

18. **Insolvency**—Receiver of an insolvent bank held not entitled to the proceeds of a draft remitted by direction of the insolvent bank to maintain the credit side of its deposit account in a correspondent bank.—*Brown v. Sheldon State Bank, Iowa*, 117 N. W. Rep. 289.

- 19.—**Sale of Stock to Bank.**—A bill by a bank and its receiver and creditors to set aside a sale of stock to it by defendant stockholders held properly dismissed.—*Bessemer Sav. Bank v. Learned*, Miss., 47 So. Rep. 119.
- 20.—**Benefit Societies.**—Provisions for Arbitration.—A provision in a certificate of insurance, providing for a reference to arbitration as a condition precedent to an action thereon, is valid so far as it relates to questions of fact.—*Knapp v. Brotherhood of American Yeomen*, Iowa, 117 N. W. Rep. 298.
- 21.—**Bills and Notes.**—Negotiable Notes.—A note stipulating that it is "subject to conditions of hotel purchase contract of even date herewith," is non-negotiable, and an indorsee takes it subject to all legal defenses existing in favor of the maker.—*Rleck v. Daigle*, N. D., 117 N. W. Rep. 346.
- 22.—**Brokers.**—Commissions.—Where plaintiff was not the procuring cause of a sale of defendant's system of railway to a syndicate, plaintiff was not entitled to commissions on such sale.—*Donaldson Bond & Stock Co. v. Houch*, Mo., 112 S. W. Rep. 242.
- 23.—**Carriers.**—Contributory Negligence.—One killed by being struck by a projection from a freight train, while standing on a station platform, was not guilty of negligence in being thereon, unless he knew that the train or projection would extend over same, and he had a right to rely on the safety of the platform.—*Metcalf v. St. Louis & S. F. R. Co.*, Ala., 47 So. Rep. 158.
- 24.—**Duty to Protect Passengers.**—Failure of servant of carrier to interfere to protect passenger from being assaulted held breach of duty to the passenger for which the carrier would be liable.—*Culbertson v. Empire Coal Co.*, Ala., 47 So. Rep. 237.
- 25.—**Injury to Alighting Passenger.**—It is not negligence in all cases, as a matter of law, for a passenger to step off a moving car at right angles.—*Birmingham Ry., Light & Power Co. v. Harden*, Ala., 47 So. Rep. 327.
- 26.—**Negligence in Jerking Cars.**—That the jerk given a train on a coupling of cars was extraordinary and unusual tends to prove negligence in operating the train.—*Mitchell v. Chicago and A. Ry. Co.*, Mo., 112 S. W. Rep. 291.
- 27.—**Shipment of Live Stock.**—A carrier receiving sheep for transportation from Idaho to Nebraska held required to stop at reasonable intervals and to provide reasonable facilities for resting, feeding, and watering the sheep.—*Groot v. Oregon Short Line R. Co.*, Utah, 96 Pac. Rep. 1019.
- 28.—**Who Are Passengers.**—Passenger alighting from train and crossing tracks to station on other side held not to cease to be a passenger because in so doing she crosses a highway.—*Powell v. Philadelphia & R. Ry. Co.*, Pa., 70 Atl. Rep. 268.
- 29.—**Charities.**—Hospitals.—The Employees Hospital Association of the Frisco Line held not to be a charitable institution exempting such institution from liability for negligence.—*Phillips v. St. Louis & S. F. R. Co.*, Mo., 112 S. W. Rep. 109.
- 30.—**Common Law.**—Effect of Later English Decisions.—The courts of this country are under no obligation to follow the mutations of decisions or new views announced by the English courts as to what was the law of that country prior to the independence of the colonies.—*Davis v. Stouffer*, Mo., 112 S. W. Rep. 282.
- 31.—**Constitutional Law.**—Due Process of Law.—A requirement that defendant in summary proceedings to recover money shall deliver up or pay the money into court as a condition of defending on the merits would be unconstitutional as not due process of law.—*White v. Ward*, Ala., 47 So. Rep. 166.
- 32.—**Improvement of Highways.**—In view of Const. art. 3, sec. 1, art. 6, sec. 10, Act March 7, 1905, (Acts 1905, pp. 493-496, c. 164; Burns' Ann. St. Supp. 1905, secs. 6816-6822), relating to the improvement of highways, held not unconstitutional.—*State v. Board of Com'rs of Marion County*, Ind., 85 N. E. Rep. 513.
- 33.—**Obligation of Contract.**—Loc. Laws 1905, pp. 329, 408, Nos. 455, 492, repealing Laws 1849, p. 294, No. 223, creating a corporation, held not invalid by the fact that the corporation had mortgaged its franchise for the payment of bonds and that the repeal would therefore affect the rights of the bondholders.—*People v. Calder*, Mich., 117 N. W. Rep. 314.
- 34.—**Smoke Ordinances.**—An ordinance prohibiting the emission of dense smoke held not unconstitutional as depriving defendant of his rights without due process of law, when invasion of property rights must be determined by court.—*Atlantic City v. France*, N. J., 70 Atl. Rep. 163.
- 35.—**Contracts.**—Forfeiture.—Forfeitures are not favored, and, if the intent is doubtful, will receive a strict construction against those for whose benefit they were introduced.—*Walker v. Burtless*, Neb., 117 N. W. Rep. 349.
- 36.—**Part Performance.**—A person partially performing services under contract held entitled to recover on a quantum meruit for the services rendered, though he cannot recover on the contract where the employer either discharged him, or took such action as rendered complete performance of the services impossible.—*Hall v. Gunter & Gunter*, Ala., 47 So. Rep. 155.
- 37.—**Corporations.**—Agreement to Purchase.—Where the directors of a corporation passed a resolution constituting an agreement to purchase the private business of its manager, held, that it was not necessary that the corporation's records show a consummated sale.—*Iowa Drug Co. v. Souers*, Iowa, 117 N. W. Rep. 300.
- 38.—**Power to Transfer Property.**—The secretary of a corporation, as such, has no authority to assign securities owned by the corporation as collateral security for a past indebtedness.—*In re W. W. Mills Co.*, U. S. D. C., E. D. N. Car., 162 Fed. Rep. 42.
- 39.—**Counties.**—Liability for Acts of Officers.—Counties held to exercise the powers delegated by the state not liable for the acts or omissions of its officers in relation to delegated powers.—*State v. Board of Com'rs of Marion County*, Ind., 85 N. E. Rep. 513.
- 40.—**Covenants.**—Building Restrictions.—Where lots in a city addition were sold with a street line restriction for the benefit of all the lots, the right of the owner of one of the said lots to enforce such restriction was not affected by the failure of the land company to enforce the same.—*Brigham v. H. G. Mulock Co.*, N. J., 70 Atl. Rep. 185.
- 41.—**Criminal Evidence.**—Contents of Diploma.—The testimony of a physician that he has a diploma authorizing him to practice medicine

is incompetent to show that he is a licensed physician.—*McAllister v. State, Ala.*, 47 So. Rep. 161.

42.—**Effect of Nolle Pros. of Co-Defendant.**—Under Code Cr. Proc. arts. 707-709, one accused of homicide cannot complain of the act of the county attorney in entering nol. pros. as to other persons indicted for the same homicide, on the ground that the nol. pros. left them without a guaranty of immunity from further prosecution, and that therefore he was deprived of the benefit of their untrammelled testimony.—*Hobbs v. State, Tex.*, 112 S. W. Rep. 308.

43. **Criminal Trial—Degree of Crime.**—*Thou*—It is for the jury to determine the degree of murder where the facts admit of either finding, where, on a first trial defendant has been convicted of murder in the second degree, the court on a second trial should instruct that he cannot be convicted of murder in the first degree.—*Commonwealth v. Deitrick, Pa.*, 70 Atl. Rep. 275.

44. **Damages—Nominal Damages.**—Where, in an action for personal injuries, there was no evidence as to loss of capacity, the court should have charged that plaintiff could recover only nominal damages therefor.—*Birmingham Ry., Light & Power Co. v. Harden, Ala.*, 47 So. Rep. 327.

45. **Deeds—Undue Influence.**—The fact that a father conveyed land to his youngest child, to the exclusion of his other children, held not to create a presumption of undue influence.—*Burnett v. Smith, Miss.*, 47 So. Rep. 117.

46.—**Acceptance.**—Where the owner of property executed a conveyance to her son, in order that he might have full power to sell the timber on the premises, and he thereafter reconveyed his interest to his mother, acceptance of his deed will be presumed.—*Lewis v. James, Mich.*, 117 N. W. Rep. 325.

47. **Descent and Distribution—Common Law Marriage.**—A common-law wife is entitled, on the death of the husband, to all the property rights accorded a widow who had been married by ceremony.—*Davis v. Stouffer, Mo.*, 112 S. W. Rep. 282.

48. **Divorce—Condonation.**—A voluntary resumption of cohabitation by the innocent spouse after separation on account of cruel conduct constituting grounds for divorce operates to condone the cruelty.—*Shirey v. Shirey, Ark.*, 112 S. W. Rep. 369.

49. **Domicile—Declarations.**—The declarations of witnesses as to a town being their home are not proper evidence to prove their residence.—*Ham v. State, Ala.*, 47 So. Rep. 126.

50. **Elections—Contest.**—In the absence of a statute providing for contesting the election of mayor of an incorporated town, the election may be contested by a proceeding in the nature of quo warranto.—*Ham v. State, Ala.*, 47 So. Rep. 126.

51. **Equity—Inadequacy of Legal Remedy.**—Where, owing to a joint traffic arrangement between a cotton compress company and a carrier, there is uncertainty as to which is liable for cotton damaged or lost, the remedy at law held so inadequate as to warrant equitable relief.—*Gulf Compress Co. v. Jones Cotton Co., Ala.*, 47 So. Rep. 251.

52. **Evidence—As to Existence of Writing.**—It was not error to overrule an objection to a question asked one of defendants whether she

had written a letter to another defendant; the question not being directed to the contents of the instrument.—*Beach v. Huntsman, Ind.*, 85 N. E. Rep. 523.

53.—**Res Gestae.**—A statement by a bystander made during the progress of a fire communicated to plaintiff's property by oil which escaped from defendant's oil tank as to the cause of the ignition of the oil was not admissible for defendant as a part of the res gestae.—*Texas & N. O. R. Co. v. Bellar, Tex.*, 112 S. W. Rep. 323.

54.—**Relevancy.**—The fact that a person had relatives in a town, and that his father and mother resided near the town, did not show that he was a resident of the town and qualified to vote.—*Ham v. State, Ala.*, 47 So. Rep. 126.

55. **Exceptions, Bill Of—Time of Settlement.**—The trial judge cannot settle a bill of exceptions more than 100 days from the adjournment of the term at which the cause was tried, decree entered, and motion for new trial overruled.—*Walker v. Burtless, Neb.*, 117 N. W. Rep. 349.

56. **Execution—Rights of Purchaser.**—A party purchasing under a judgment at a time when it is subject to vacation, loses his title on the destruction of the judgment, and this notwithstanding a sale by him to an innocent purchaser.—*McLean v. Stith, Tex.*, 112 S. W. Rep. 355.

57. **Executors and Administrators—Action for Death of Decedent.**—An administrator entitled to sue for the death of a child under Code 1896, Sec. 26, could have no right or title to the chose in action in such case as against the parents who may deal with it as they choose.—*White v. Ward, Ala.*, 47 So. Rep. 166.

58.—**Administrator De Bonis Non.**—The giving of a bond by an executrix, who is also residuary legatee, held no ground for refusing to appoint an administrator de bonis non, nor for removal after such appointment.—*Chamberlain v. Stecher, Ohio*, 85 N. E. Rep. 526.

59. **Federal Courts—Protection of Party From State Authorities.**—A plaintiff, in an action in a federal court, whose presence in court was necessary to the trial of the issues joined therein, held entitled to a writ of protection to prevent his seizure by the state authorities and return to an insane asylum from which he had escaped while in the state in attendance on the trial.—*Chanler v. Sherman, U. S. C. C. of App., Second Circuit*, 162 Fed. Rep. 19.

60. **Frauds, Statute of—Sale of Land.**—Under the express provisions of Code 1907, Sec. 4289, a parol contract for the sale of land is valid where the purchaser pays the purchase price, or a portion thereof, and is put in possession of the land by the vendor.—*Jones v. Gainer, Ala.*, 47 So. Rep. 142.

61. **Garnishment—Effect of Judgment for Garnishee.**—Judgment discharging the garnishee, after answer denying indebtedness, held conclusive, against the creditor, of no indebtedness of the garnishee.—*Roman v. Montgomery Iron Works, Ala.*, 47 So. Rep. 136.

62. **Grand Jury—Objections to Drawing.**—Under the express provisions of Code 1896, Sec. 5269, no objection could be taken to a grand jury, except on the ground that the jurors were not drawn in the presence of the officers designated by law.—*Richter v. State, Ala.*, 47 So. Rep. 163.

63. **Guardian and Ward—Estoppel.**—A tutor

who connived with the purchaser of property of which he was the owner of one half and his children the owners of the other half to the detriment of his children is concluded from thereafter claiming any right as owner.—Gary v. Landry, La., 47 So. Rep. 124.

64. **Highways—Legislative Control.**—All roads laid out under legislative enactment are public highways belonging to the state under full control of the legislature, which may, in the absence of constitutional limitations, exercise such control directly.—State v. Board of Com'rs of Marion County, Ind., 85 N. E. Rep. 513.

65. **Homicide—Assault With Intent to Kill.**—If accused fired his pistol at witness accidentally, or there is reasonable doubt as to it, accused is not guilty of assault with intent to murder.—Sweatt v. State, Ala., 47 So. Rep. 194.

66. **Cross-Examination of Wife.**—In a prosecution for homicide a statement by defendant's wife on cross-examination that she had told a neighbor that defendant had gone to look for decedent and that she did not know what was going to happen held ground for reversal.—Hobbs v. State, Tex., 112 S. W. Rep. 308.

67. **Dying Declarations.**—The state could ask decedent's wife, who had testified to his dying declaration "What was the question that you asked him?" to further identify him of whom decedent spoke.—Greer v. State, Ala., 47 So. Rep. 300.

68. **Self-Defense.**—That one of ordinary self-control might not have resented provocation offered by accused does not show that he did not provoke the difficulty as affecting his plea of self-defense.—McBryde v. State, Ala., 47 So. Rep. 302.

69. **Husband and Wife—Annulment of Marriage.**—The court, in annulling a marriage contract on the ground of infancy of the wife or because of the inadequacy of the provisions made for her, will restore to the husband the property settled on the wife if she has not parted with it.—Shirey v. Shirey, Ark., 112 S. W. Rep. 369.

70. **Infants—Rights of Innocent Purchasers.**—The defense of innocent purchaser cannot be set up by one purchasing at a sale under a power of sale in a will as against the incapacity of an infant heir of a pretermitted child.—Rowe v. Allison, Ark., 112 S. W. Rep. 395.

71. **Injunction—Violation.**—In a suit for violation for a strike injunction, a local union of which respondents were members, and other unincorporated unions, held improperly joined as defendants.—Casson v. Amalgamated Woodworkers of America, Local No. 24, Mass., 85 N. E. Rep. 529.

72. **Insolvency—Bill to Review Decision.**—A decree of the Supreme Judicial Court dismissing a bill to review a decision of the insolvency court and affirming its decision held not, as to the affirmance, to harm plaintiff as the dismissal of the bill barred subsequent attempt at revision on any of the grounds alleged.—Jackson v. Ensign, Mass., 85 N. E. Rep. 527.

73. **Judgment—Res Judicata.**—A nonresident married woman interested in a will to the extent of her marital rights in the property, thereby given her husband, held not bound by proceedings for construction of the will, because when on a visit to the state she heard them discussed by her husband's family.—Lumpkin v. Lumpkin, Md., 70 Atl. Rep. 238.

74. **Vendor's Lien.**—A prayer for general and special relief in a suit to set aside a judgment foreclosing a vendor's lien held to authorize a judgment setting aside a sale thereunder.—McLean v. Stith, Tex., 112 S. W. Rep. 355.

75. **Life Estates—Adverse Possession Under Life Tenant.**—Possession of a life estate cannot become adverse as against the remainderman until after the death of the life tenant.—Cramton v. Rutledge, Ala., 47 So. Rep. 214.

76. **Life Insurance—Breach of Agency Contract.**—The failure of a soliciting agent of an insurance company to make reports called for by his contract of employment held to forfeit his rights under the contract.—Armstrong v. National Life Ins. Co., Tex., 112 S. W. Rep. 327.

77. **Limitation of Actions—Judgment.**—Limitation could not run against plaintiff's right to set aside a judgment and certain sales thereunder for fraud, while plaintiff was a lunatic, nor until his sanity was restored.—McLean v. Stith, Tex., 112 S. W. Rep. 355.

78. **Master and Servant—Assumed Risk.**—An employee does not assume any risk arising from his employer's failure to perform the duties owing from him to the employee with respect to the appliances furnished for the doing of the work.—San Francisco & P. S. S. Co. v. Carlson, U. S. C. C. of App., Ninth Circuit, 161 Fed. Rep. 851.

79. **Coal Mines.**—A complaint, in an action for the death of a coal miner, caused by the falling of a roof, held not insufficient for failing to show whether he was injured in his room of the mine or in an entry thereto, being bound to prop the roof of the room.—Mascot Coal Co. v. Garrett, Ala., 47 So. Rep. 149.

80. **Injury to Employee.**—A petition alleging that plaintiff was injured by the fall of an elevator held subject to a special demurrer, where it failed to allege that the defects therein were not latent, or that they might have been discovered by the master.—Eagle & Phenix Mills v. Johnson, Ga., 61 S. E. Rep. 990.

81. **Negligence.**—The complaint for injury to an employee in a mine from ignition or explosion of gas "or other substance" held bad in not showing negligence as to the "other substance," in the absence of statutory duty to furnish ventilation other than for carrying off "noxious gases."—Sloss-Sheffield Steel & Iron Co. v. Shary, Ala., 47 So. Rep. 279.

82. **Safe Place to Work.**—A master conducting a quarry held bound to inspect the walls to prevent injuries to servants from the falling of rock, etc., and a greater diligence in that respect is required when weather conditions increase the danger.—Alabama Consol. Coal & Iron Co. v. Hammond, Ala., 47 So. Rep. 248.

83. **Mechanics' Lien—Right to Lien.**—Where an agent for the owners of a house contracts for the installation of a furnace, being authorized to do so, a lien attaches to the property for the materials furnished and labor performed by virtue of the statute, and not by virtue of the contract.—Beach v. Huntsman, Ind., 85 N. E. Rep. 523.

84. **Money Received—Money Received Under Claim of Right.**—Where money was paid to and received by defendant under claim of right, there was no implied promise on its part which would support an action against it for money had and received by one who at the time dis-

claimed any interest therein.—Third Nat. Bank of St. Louis v. Rice, U. S. C. C. of App., 161 Fed. Rep. 822.

85. **Mortgages**—Foreclosure.—Foreclosure sale by mortgagee to himself under power of sale contained in mortgagee cuts off the equity of redemption as effectually without, as with, a deed and leaves the mortgagor only the statutory right of redemption, which may be exercised within two years of the sale.—Jackson v. Tribble, Ala., 47 So. Rep. 310.

86.—Prior Quit-Claim Deed by One in Possession.—Where a mortgagee recovers possession of the land by process in an action brought for that purpose alone and peaceable possession for a year is held, the right of heirs of the mortgagor to redeem held foreclosed in the absence of fraud or collusion.—Walker v. Chessman, N. H., 70 Atl. Rep. 248.

87. **Municipal Corporations**—Irregularities in Organization.—After sixteen years' exercise of the functions of a municipal corporation and acts of the legislature distinctly recognizing the municipal corporation, held, that a proceeding to dissolve it for supposed irregularity in its organization would not be entertained.—State v. Town of Pell City, Ala., 47 So. Rep. 246.

88.—Sewer Contracts.—Blasting powder, dynamite, fuse, and caps, necessarily used by contractors in building a sewer, are materials within the meaning of a guaranty that the contractors would pay for materials used in the work.—Kansas City v. Youmans, Mo., 112 S. W. Rep. 225.

89. **Negligence**—Proximate Cause.—Proximate cause of an explosion of powder, if occurring as claimed, and any actionable negligence of the master, held to be failure to properly erect electric wires.—Western Coal & Mining Co. v. Garner, Ark., 112 S. W. Rep. 392.

90.—Synonymous Terms.—"Carelessly" and "negligently" are synonymous terms.—Mascot Coal Co. v. Garrett, Ala., 47 So. Rep. 149.

91. **New Trial**—Misconduct of Juror.—The fact that a lawyer's neighbor is sitting as a juror on a trial in which he is engaged, and they walked together to the courthouse conversing upon different matters, is in itself no ground for a new trial.—Alpena Tp. v. Mainville, Mich., 117 N. W. Rep. 338.

92. **Nuisance**—What Constitutes.—The escape of fine limestone dust from a stone crusher which disturbs the comfortable enjoyment of contiguous premises, may be enjoined as a nuisance.—Blackford v. Heman Const. Co., Mo., 112 S. W. Rep. 287.

93. **Pawnbrokers**—Conversion.—A pawnbroker held liable for conversion, where the pledgor without authority pawned his wife's ring, and the pawnbroker at direction of the husband delivered it to another.—Clay v. Sullivan, Ala., 47 So. Rep. 153.

94. **Payment**—Presumptions.—Where the presumption of payment of a debt arising by the debtor's executing his note either to the creditor, or to a third person, deprives the party accepting the note of a collateral security, or some other substantial benefit, such circumstance rebuts the presumption.—Beach v. Huntsman, Ind., 85 N. E. Rep. 523.

95. **Pleading**—Departure from Original Bill.—In a suit by an assignee of the interest of a partner against the assignor and the other partners to enforce the contract of assignment and

for an accounting of the partnership business; an amended bill held not a departure from the original bill.—Bentley v. Barnes, Ala., 47 So. Rep. 159.

96.—Election Between Causes of Action.—As against a motion to elect, a count in a petition for the pollution of a stream held not to contain more than one cause of action in asking for separate damages arising from the injury.—Kellor v. City of Kirksville, Mo., 112 S. W. Rep. 296.

97. **Railroads**—Fires Caused by Contributory Negligence.—The negligence of an owner of property adjacent to a railroad right of way which precludes a recovery for loss by fire set by the railroad company is the failure, after the fire has been set, to do that which prudence requires or the doing of some act inconsistent with the preservation of the property.—Southern Ry. Co. v. Darwin, Ala., 47 So. Rep. 314.

98. **Receivers**—Wrongful Appointment.—A party at whose instance a receiver is wrongfully appointed must bear the expense thereof.—Wills Valley Min. & Mfg. Co. v. Galloway, Ala., 47 So. Rep. 141.

99. **Remainders**—Acceleration.—Where testator devises one-sixth of his real estate to his widow for life and at her death to the son, and devises the remaining five-sixths of his real estate to others, and the widow elects to take her dower, the value of which exceeds the value of her life estate, the remainder in the one-sixth will not be accelerated, but the widow's life estate will be sequestered to compensate the disappointed devisees.—Holdren v. Holdren, Ohio, 85 N. E. Rep. 537.

100. **Replevin**—Necessity for Demand.—Replevin will not lie to recover property which came lawfully into defendant's possession, in the absence of a demand upon him therefor.—Anderson v. Pendl, Mich., 117 N. W. Rep. 326.

101. **Sales**—Fraudulent Purpose.—A purchase of goods is fraudulent where the buyer has no intention to pay for the same or has no reasonable expectation of being able to pay therefor.—Pelham v. Chattahoochee Grocery Co., Ala., 47 So. Rep. 172.

102.—Rescission.—A buyer who offered to restore a horse, the sale of which was induced by fraud, would have the right to rescind without taking affirmative steps to compel a rescission.—Fuller v. Chenault, Ala., 47 So. Rep. 197.

103. **Sheriffs and Constables**—Terms of Sheriff.—Under Constitutional Amendment, art. 17, relating to the terms of holding offices, and Act April 16, 1906, (98 Ohio Laws, p. 271), passed pursuant thereto, a sheriff whose term of office was extended under the act is not ineligible under Const. art. 10, Sec. 3, rendering a sheriff ineligible to succeed himself for another term.—State v. Pontius, Ohio, 85 N. E. Rep. 540.

104. **Signatures**—Mode of Affixing.—The general rule is that, where a document is required by the common law or by statute to be signed by any person, the signature of his name in his own handwriting is not required.—Porter v. J. J. Boyd Pav. & Const. Co., Mo., 112 S. W. Rep. 235.

105. **Specific Performance**—Assignment of Patent in Trust.—An instrument conveying a patent to one in trust for himself and others named, without power to sell the same, creates a valid trust under which the trustees cannot sell or convey the legal title to the patent or any part thereof without the consent of all of

the equitable owners.—*McDuffee v. Hestonville, M. & F. Pass. Ry. Co., U. S. C. C. of App., 162 Fed. Rep. 36.*

106.—*Laches*.—Where a purchaser of land under a verbal contract takes and retains possession of the premises with the vendor's consent, his mere delay in bringing suit for specific performance will not constitute a bar to the suit, where he has never been put in default by any act of the vendor.—*Jones v. Gainer, Ala., 47 So. Rep. 142.*

107. *Statutes—Repeal*.—When two acts are passed at the same session of the legislature, the presumption is strong against implied repeal and effect must be given to each if possible, but, if the two are irreconcilable, the one approved last will prevail, even if they took effect on the same day.—*State v. Board of Com'rs of Marion County, Ind., 85 N. E. Rep. 513.*

108.—*Sufficiency*.—Where two subjects are expressed in the title of an act, and the body thereof embraces both, the whole act will be treated as void; but where only one subject is expressed, and the body of the act contains matter not within the purview thereof, the latter will be expunged, if separable.—*Ham v. State, Ala., 47 So. Rep. 126.*

109. *Street Railroads—Duty of Receivers*.—Receivers operating street railroad lines being trustees for the owners and creditors, it is their duty to curtail transfer privileges of passengers where it will increase the earnings of the property, and there is no law of the state requiring the issuing of such transfers.—*In re Receiverships of Street Rys., U. S. C. C., S. D. N. Y., 161 Fed. Rep. 879.*

110. *Taxation—Power of Legislature*.—The power of the legislature in matters of taxation for public purposes is unlimited, except as restricted by the state or federal Constitution.—*State v. Board of Com'rs of Marion County, Ind., 85 N. E. Rep. 513.*

111.—*What Constitutes Collection*.—The delivery by a county treasurer to a bank of a receipt for the amount of taxes due from the bank and the credit of the amount thereof on his deposit account in the bank, held to be a collection of the tax as between the treasurer and the county.—*Brown v. Sheldon State Bank, Iowa, 117 N. W. Rep. 289.*

112. *Telegraphs and Telephones—Mental Suffering*.—Mental suffering by a wife due to a disappointment in not being met at a train by her husband held not a ground of recovery against a telegraph company.—*Western Union Telegraph Co. v. Howland, Ala., 47 So. Rep. 341.*

113.—*Parties*.—Addressee of telegram held not a party to the contract so as to entitle her to maintain action for its breach.—*Heathcoat v. Western Union Telegraph Co., Ala., 47 So. Rep. 139.*

114. *Vendor and Purchaser—Forfeiture of Contract*.—Where a contract for the sale of real estate provided that on the vendee's default the money theretofore paid thereon "is to be declared forfeited," held, that it was incumbent on the vendor on default to declare a forfeiture to entitle her to retain said money.—*Walker v. Burtless, Neb., 117 N. W. Rep. 349.*

115. *Waters and Water Courses—Flowage*.—Draining certain ponds into a flooded place by tiline held not to warrant reduction of damages from flooding by an embankment, in the

absence of a showing that the course of flow had been changed or the flood augmented by plaintiff's act.—*Steber v. Chicago & G. W. Ry. Co., Iowa, 117 N. W. Rep. 304.*

116.—*Grant of Franchise to Use Streets*.—A franchise granted by a municipality to a private corporation to occupy streets in the construction of a water system will not be construed as giving an exclusive right in the absence of express words to that effect.—*Franklin Trust Co. v. Peninsular Pure Water Co., U. S. C. C. of App., Fourth Circuit, 161 Fed. Rep. 855.*

117.—*Reservation by United States*.—The general government has power to reserve the waters on the public domain and exempt them from appropriation under state laws.—*Conrad Inv. Co. v. United States, U. S. C. C. of App., Ninth Circuit, 161 Fed. Rep. 829.*

118.—*Riparian Rights*.—A riparian proprietor has a right to detain the water of a stream by a dam so far as is reasonable and necessary for rightful purposes, but not to detain it unnecessarily or spread it out so that it is lost by absorption or evaporation.—*North Alabama Coal, Iron & Ry. Co. v. Jones, Ala., 47 So. Rep. 144.*

119. *Wills—Construction*.—The law regards the spirit rather than the mere letter of a will, and from the words actually employed the general intent may be inferred, though it is not particularly expressed; but words cannot be added to a will on mere conjecture.—*Smith v. Smith, Ala., 47 So. Rep. 220.*

120.—*Executory Gifts*.—An executory gift to take effect on a prior devisee neglecting or refusing to accept the devise or perform a prescribed act will take effect notwithstanding the object of the prior gift never came into existence.—*Ege v. Hering, Md., 70 Atl. Rep. 221.*

121.—*Provisions for Children*.—A will providing for children as a class, without naming them, held valid under Kirby's Dig. Sec. 8020, providing that a testator omitting to mention a living child in his will shall be deemed intestate as regards the child.—*Brown v. Nelms, Ark., 112 S. W. Rep. 373.*

122. *Witnesses—Admission of Writing*.—Where appraisers testifying as to the value of a bankrupt's property used the appraisal to refresh their recollection, the court did not err in admitting the appraisal merely as a statement of the testimony of the witness.—*Atherton v. Emerson, Mass., 85 N. E. Rep. 530.*

123.—*Competency of Physician*.—Under a disqualifying statute a physician held not disqualified to testify that on the occasion of his visiting his patient for the purpose of collecting a bill he saw her walk about the house and upstairs without crutches.—*Chlanda v. St. Louis Transit Co., Mo., 112 S. W. Rep. 249.*

124.—*Impeachment*.—The fact that a bad state of feeling existed between a witness and a person who was neither a party to nor a witness in a proceeding held not competent testimony.—*Ham v. State, Ala., 47 So. Rep. 126.*

125. *Work and Labor—Services in Family Relation*.—While an agreement to pay for domestic services rendered in a family by a member thereof is never presumed, such presumption is rebuttable; and whether or not an agreement existed is a question of fact.—*Wise v. Outtrim, Iowa, 117 N. W. Rep. 264.*

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THE WORKINGS OF THE PROHIBITION LAW IN GEORGIA.

The remarkably eloquent and unusual charge of United States District Judge Speer to the grand jury, reported under the title, *In re Charge to Grand Jury*, 162 Fed. 736, besides declaring the rule on two unusual points of law connected with the unlawful sale of intoxicating liquors, is also, as far as we are advised, the first unqualified judicial declaration in favor of the absolute prohibition of the liquor traffic, and therefore deserves more than passing notice.

The first point decided was the propriety of the federal courts aiding a state in the enforcement of the prohibition law under the provisions of the internal revenue law. The position taken by Justice Speer was to the effect that while the cardinal purpose of the provisions of the internal revenue law imposing special taxes on retail liquor dealers is the raising of revenue for the United States, the federal courts may properly, in the exercise of the powers vested in them, under 18 Stat. 310, c. 36, rigidly enforce the penalties provided for a violation of such law, for the secondary purpose of aiding in the enforcement of the laws of a state regulating or prohibiting the sale of liquors. The section referred to by the court has reference to the penalty to be imposed on any person "who shall carry on the business of a retail liquor dealer without having paid the special tax required by law." It would seem that Justice Speer, in this instance, somewhat strains the purpose of the internal revenue law, which is the collection of revenue, in using it to enforce the prohibition law of Georgia.

The basis of Justice Speer's charge to the federal grand jury was a report of the marshal that several clubs, called "locker clubs," existed in the city of Savannah, selling liquor to members, either directly

over a bar or by depositing bottles of liquor in "lockers" for the use of individual members. Justice Speer deals a severe blow to this subterfuge for evading the prohibition law of Georgia by holding the members and proprietors of such clubs as individual liquor dealers, each and all of them liable to be fined therefor under the federal statute. The court said: "Under the statute law of Georgia, which makes it unlawful for any person to sell or barter either directly or indirectly, or to keep or furnish at any public place, or to keep on hand at any place of business, intoxicating liquors, a municipal corporation cannot lawfully license or charter a so-called 'locker club' which, in fact, sells or furnishes liquors to its members, and such illegal charter is no protection to its members, each one of whom, who by his money, name, or patronage contributes to its support and maintenance, is a retail liquor dealer within the internal revenue law of the United States; subject to special tax as such and to the penalty imposed for carrying on the business without payment of such tax where a single tax stamp only is taken out in the name of the club."

The admitted purpose of Justice Speer in thus extending the operation of the federal law taxing the business of selling intoxicating liquors was the enforcement of the prohibition law of Georgia, a law which Justice Speer believes to be so far reaching in the wonderful benefits it bestows upon society and good government as to justify the application of the law even to the extent indicated, where the ultimate object is "the general welfare of the people" and "the elevation of their moral status." He then delivered his declaration in favor of the absolute prohibition of the liquor traffic, which is as unusual as it is eloquent. Justice Speer said:

"Already, the most astounding benefits have been experienced by the people at large from the prohibition law. Why, even the dumb brutes, who have been subjected to the service of man, would, if they could, thank God for prohibition. The

hard driving and neglect of the drunken negro, and the drunken white man as well, have been succeeded by kindness and attention. The state of Georgia, in twelve months will gain incalculable advantage in the improvement of stock alone, because drunkards no longer handle and drive them. A prominent mill man in Macon, one of our best citizens, assured me that, while heretofore he could not get his men to work before Tuesday or Wednesday after the Saturday night debauch, now that whisky is gone, bright and early Monday morning they are at the engine, the spindle, and the loom. Labor, which was almost impossible to obtain through the rural districts, is now plentiful, and the work has just begun. Little more than a year ago I heard experienced contractors complain that many of their laborers would work only a day or two in a week to obtain enough money for support, and the small amount of food consumed, and then quit work until the money was gone. The police courts of such great cities as Macon, Augusta and Atlanta, when contrasted with their former methods, have practically gone out of business. The offenses formerly engaging their attention are now not committed. This will be found true in the superior courts and the county courts throughout the state of Georgia. Where a week or two weeks of the people's time and money were expended upon the criminal docket, it will not bear out my experience if they do not finish in a day, or two days. I well remember when I was a young solicitor general that in one county in my circuit the sale of liquor was forbidden. Early Monday morning the tall, stalwart, clear-eyed people, cleanly, manly, quiet, temperate, and discreet would gather in the county seat. By the second day we were through with the criminal docket. In an adjoining county, with the same lands, the same climate, and the same people, often of the same families, the sale of liquor was present. The faithful judge was prompt to call the criminal docket at the first moment, but it was usually true, that, with

all the energy and dispatch of its officers, at least two weeks were required for its disposition. The looks of the people were different. In one county there was the temperate life, where hope elevates and joy brightens. In the other the countenances of the people were sodden. There was the bleared and bilious eye, the lurid visage, the unshorn jaws, and not unfrequently the unbathed person, which dispelled in the court an odor that in the language of John Wesley on one occasion 'did not smell like balsam.' In a short time after the abolition of the liquor traffic, in the noble city of Athens, I have seen the drunkard reformed and reconsecrated to the duties of manhood, his dingy house repainted, his fences rebuilt, his once pathetic, bare-foot, dirty little children clean, well-clothed, well-shod, and well-fed, with bright eyes hastening to school, and the wife, whose once worn and wasted features, in the happiness and pride of his resurrection, had regained the loveliness and charm of youth.

"I have not discussed the moral phases of this great question, but merely those which seem to be legal and political. If the laws which the people of our state have enacted are enforced, the chief happiness to inure to those we love is the consciousness that henceforth, if we expel the demon of the still from our borders, confidence and peace will reassume their place in happy homes among those dear objects of our love, dearer to us 'than are the ruddy drops that visit our hearts.' Once there was within my own memory no such thing in all the borders of this Southland as that unspeakable crime, the bare mention of which will stir a fever in the blood of age, and make the infant's sinews strong as steel. It will disappear from our civilization when the brain of the docile African, even of the lowest order, is no longer infuriated and rendered careless or desperate of consequences by the drink he absorbs. In his furtive wanderings on the lonely roads, or in his solitary lair in the forest, the poisonous cardiac stimulant drives the blood of the

savage in swift pulsations to his compressed or maddened brain, and then—no matter how desperate the chance or certain of detection—the crime is committed. This it is which has ranked the people of Georgia, save perhaps in one or two great cosmopolitan cities, in the serried ranks of those who have determined that the sale and furnishing of liquor shall stop within our borders. The politicians did not do it. They framed a platform for local option. The representatives of the people stamped the planks of this platform into nothingness. It is a revolution, and it will not stop with Georgia, nor do I believe it will stop with the South. Even now the senior senator of this state has invoked the powerful aid of Congress to fulfill the purpose of this people. Lives will become irradiant by its presence. Gentle woman reassumes her rightful station as regnant queen. The prayers of good men in great cities, amid the dim religious light of great churches, are heard that it may prosper. And in country churches, in the shades of gigantic oaks, or amid the sighing pines, the prayers and the song worship of the simple, earnest servants of the old-time religion, as they roll away amid the aisles of the forest, are a thank-offering of a long suffering and a sorely troubled people that strong drink has been forever banished from our state."

It is strange when one comes to consider it, how liberal is the attitude of nearly every court, federal and state, toward prohibition laws, and how equally hostile is the attitude of public prosecutors, as a general rule, to their enforcement. The Supreme Court of the United States in *Ex parte Christensen* has declared the saloon an outlaw, and outside the pale of constitutional protection, so far as the right to do business is concerned, and yet the sentiment in certain cities and localities is so strong in its favor, as to virtually nullify the enforcement of all laws attempting to repress, or even to regulate, this peculiar traffic. It is not so with any other law,—will it ever be thus with our laws regulating the sale of intoxicating liquors?

NOTES OF IMPORTANT DECISIONS.

TELEGRAPHS AND TELEPHONES—RECOVERY OF DAMAGES FOR MENTAL SUFFERING DEPENDENT UPON THE RELATIONSHIP BETWEEN THE PARTIES.—We called attention recently to the marked tendency in the authorities, which have adopted the rule permitting recovery for mental suffering occasioned by the non-delivery of a telegram, to restrict the operation of the rule to cases where the relationship between the parties is that of husband and wife, parent and child, brother and sister, grandparent and grandchild. This is now the rule firmly established by the court of appeals of Kentucky in the recent case of *Lee v. Western Union Telegraph Co.*, 113 S. W. 55, where the court said: "It may be considered as the settled doctrine in this state that in cases of this character, where damages are sought for the failure to send or deliver a telegram announcing the sickness or death of a relative, a recovery cannot be had unless the relationship between the parties is that of parent and child, husband and wife, sister and brother, or grandparent and grandchild. This rule may be considered, and indeed it is, arbitrary; but the peculiar and speculative nature of the doctrine upon which the right of recovery rests in cases of this character makes it necessary that there should be limitations placed upon it. It must be conceded that the restrictions we have placed on the right of recovery are not satisfactory. Often persons farther removed in kinship and relationship than those we have enumerated would suffer greater mental anguish at being prevented from attending the bedside of a sick or burial of a deceased friend or relative than would a sister or brother. But, as the line must be drawn somewhere, it seems appropriate to put it at the point where the parties are united by close blood relation or marriage ties.

We cannot altogether agree with the statement of the court that the rule which it announces is wholly arbitrary. As we attempted to show in our exhaustive annotation in 67 Cent. L. J. 286, this rule is based on the presumption that mental anguish arises in all such cases where blood relationship exists under and by virtue of a law of nature, so universal that a telegraph company must be presumed to be cognizant thereof when it made the contract to send the telegram. Such damages therefore, may be said to arise naturally and to have been in the contemplation of the parties to the contract.

THE TRUST RELATION BETWEEN CORPORATE OFFICERS AND STOCKHOLDERS BUYING OF, OR SELLING THEIR STOCK TO THEM.

A president and director of a corporation in a city of this state for nearly two years last past, in season and out of season, had represented that the company was not in a prosperous condition. All the stock was paid up and the stockholders had voluntarily contributed a certain percentage of the par value of their stock in order to create a "working surplus." Several months ago this officer sent a circular letter to the stockholders wherein he stated that the prospects of the company were not encouraging, that the surplus had been decreased by losses, and that it would probably be still further decreased. A few weeks after this first circular letter was issued he sent another of a similar character, showing a further decrease of the surplus and said that another fifty per cent contribution was necessary if the business was to be continued. At the same time he expressed a willingness to purchase the stock, naming a low figure, and taking the risk of loss or gain. Nearly all the stockholders sold out to him at the figure he named. During the time he was making these representations, he had secretly entered into a contract with a rival company to deliver the stock of his company to it at an advance of over twenty-five per cent on the price he was paying. When he had gathered in all the stock he could secure, (which was nearly the entire stock of his company) he sold out to this rival company. Suddenly it was revealed to the selling stockholders how they had been "duped." Many of them were men of good business qualifications.

Similar transactions are common in the business world; and are often regarded as examples of "brilliant financiering." As, for instance, the case of a noted railroad president, having absolute control over the directors of his company, who had dividends that should have been paid held back, thereby greatly depressing the market value

of the stock of the company, while at the same time his secret agents were buying up this stock at the low market figure.

Other instances are numerous where directors with the inside information they have gained by reason of their official connection with their companies know that this stock is of greater value than the figure at which it is quoted in the market or at which sales of it are made; and by reason of this information without any representations whatever, purchase the holding of their stockholders, who are ignorant of the true value of such holdings, at the quoted market value.

Will the courts in such instances, of which these are only representatives, afford relief to the complaining stockholders? And if they do not, ought they not as "courts of conscience" do so?

It will be at once perceived that the first two instances are instances of active frauds,—at least active moral frauds; while the third instance is an instance of a passive fraud,—at least a passive moral fraud. In the two instances given demands of the cheated stockholder appeal to the court much more strongly than in the latter instance; for an active fraud always arouses a court of equity much more quickly than a passive one.

The granting of relief, however, in the third example usually turns upon the question whether or not the director, or other representative official, bears such a confidential relation to the stockholder as an individual as requires him before purchasing his stock, to put him in possession of all the facts he knows bearing on the value of the stock he desires to purchase; or, as some of the cases express it, is such officer a "trustee of the stockholder?"

Whether or not a director, or a president, or a secretary if you please, is a "trustee for the stockholders," in the latter's individual capacities as stockholders is a question upon which the courts hold diametrically opposite conclusions; and naturally reach diametrically opposite results.

Let us take up the line of cases holding that a director is not a trustee for a stock-

holder in such a sense as requires him to reveal to the stockholder selling his stock to him, all the information he possesses concerning matters from which its value may be determined. Probably the earliest case on this point (1868), arose in New York, in which it was held that the director was not required to reveal to the stockholder information he had acquired by reason of his connection as an officer with the corporation. In passing upon this question this language was used:

"Its trustees or directors are its agents for managing its affairs. They are such agents, viewing the corporation either in the abstract, as an immaterial thing, of legislative creation, with a *name*, and certain powers and rights given by law, or as composed of its corporators, or shareholders, having the right to share *pro rata* in the dividends. There is, therefore, a certain trust relation between the shareholders and the directors of the company, but the trust put in the directors usually extends, and I must assume that in this case it extended only to the management of the general affairs of the corporation, with a view to dividends of profits, and, therefore, that the trust relation between the plaintiff and the defendant, Danforth, extended no further. The title to the property of a corporation is in neither the directors nor stockholders. It is in the corporation as an abstract, immaterial thing of legal creation. The directors are not trustees for the sale of the stock of the corporation. They have no power *as directors*, to sell stock; they have no power to sell any stock but their own. The defendant, Danforth, was not a trustee for the sale of the plaintiff's stock. The plaintiff's stock was not the subject of trust between them, nor had the trust relations between them any connections with the plaintiff's stock, except so far as the good or bad management of the general affairs of a corporation by the directors, indirectly affects the value of the stock."¹

In Indiana a similar case was decided as early as 1873, which is often cited, and the

soundness of which has frequently been questioned. In that case² no fraudulent representations were made by the director; he simply remained passive and did not furnish the selling stockholder information he had gained as a stockholder. The court examined in detail many cases³ cited by counsel and found only one in point—the one from which a quotation has already been made and none to conflict with it. It cannot be said that the case was hastily considered; and it cannot also be said that the reasoning of the court upon the exact point at issue was either profound or convincing.⁴ "Stock in a corporation," says the court, "held by an individual is his own private property, which he may sell or dispose of as he sees proper, and over which neither the corporation nor its officers have any control. It is the subject of daily commerce and is bought and sold in market like any other marketable commodity. The directors have no control over it whatever or duty to discharge in reference to its sale and transfer, unless it be to see that proper books and particulars are furnished for that purpose. As the property of the individual holder, he holds it free from the dominion and control of the directors, as he does his lands or other property. * * * * * Such being the nature of the interest of the stockholder in his stock, and the directors having no control, power, or dominion over it

(2) Board v. Reynolds, 44 Ind. 509, 15 Am. Rep. 245.

(3) Sperring's Appeal, 71 Pa. St. 11; Smith v. Hurd, 12 Met. 271; Allen v. Curtis, 26 Conn. 456; Van Allen v. The Assessor's 3 Wal. 573; Queen v. Amend, 9 A. & E. N. S. 806; Carpenter v. Danforth, 52 Barb. 581; Robinson v. Smith, 3 Paige 222; Verplank v. Mercantile Ins. Co., 1 Edw. Ch. 84; Scott v. Depeyster, 1 Edw. Ch. 513; Cumberland Coal, etc. Co. v. Sherman, 30 Barb. 553; Bliss v. Matterson, 45 N. Y. 22; Bedford R. R. Co. v. Bowser, 48 Pa. St. 29; Bayless v. Orne. Freeman (Miss.), 161; Hodges v. New England Screw Co., 1 R. I. 312; European etc., Ry. Co. v. Poor, 59 Me. 277; Dodge v. Woolsey, 18 How. 331; Koehler v. Black, etc. Co., 2 Black, 715; York, etc. Ry. Co. v. Hudson, 19 Eng. L. & Eq. 361; Great Luxembourg Ry. Co. v. Megrew, 25 Bear. 586; Ex Parte Bennett, 18 Beav. 339, and Walsham v. Stinton, 1 De G. J. & S., Ch. 678.

(4) Seymour D. Thompson says of this decision that it "proceeds upon a conception which, if extended, would sanction nearly all of the fraud and injustice which the managers of corporations have committed against stockholders." 3 Thomp. Corp. sec. 4034.

(1) Carpenter v. Danforth, 52 Barb. 581; 19 Abb. Prac. 225.

or duty to discharge in reference to it, beyond the duty devolving upon them to prudently manage the affairs and property of the corporation itself, it seems to us to be clear, that, in the purchase of stock by a director from the holder, the relation of trustee and *cestui que trust* does not exist between them."

I cite a case to the same effect. Directors of a corporation, in which the plaintiff was a stockholder, in pursuance of a desire of the corporation to dispose of its business, made a contract with each stockholder whereby they purchased an option to buy the stock at double its par value. About the same time these directors gave a new concern an option to purchase all the stock at the same rate, and an additional sum to meet outstanding liabilities. The plaintiff delivered his stock to the directors, receiving pay therefor, and the new concern agreed to purchase under its option. Afterwards, ten days before the stock was actually transferred to the new owner, the directors agreed with it, in consideration of considerable amounts of its bonded stocks, to accept positions in it as directors. It was held that no such a fiduciary relationship existed between the directors and plaintiff as entitled him to recover damages.⁵

The text book writers have fallen into the same line without a critical examination of the question.⁶ And of course the same only would apply where the purchaser and seller of the stock were both directors.⁷

(5) *Walsh v. Goulder*, 130 Mich. 531, 90 N. W. 406; 9 Detroit, Leg. News, 145. The following cases were in point: *Deadrick v. Wilson*, 8 Baxt. (Tenn.), 108; *Cromwell v. Jackson*, 53 N. J. L. 656 23 Atl. 426; *O'Neill v. Ternes*, 32 Wash. 528, 73 Pac. 692; *Hooker v. Midland Steel Co.*, 215 Ill. 444, 74 N. E. 445, affirming 117 Ill. App. 441; *Stark v. Soule*, 45 Hun. 588, 9 N. Y. St. Rep. 555.

(6) 2 Taylor on Corp. Sec. 698; 1 Cook on Corp., Sec. 320; *Helliwell on Stock and Stockholders*, Sec. 184; 1 Purdy's Beach on Corp., Sec. 356 (d) (of the nine cases cited on the proposition in this work only three are in point). 21 Am. & Eng. Ency. 988, 10 Cyc. 796. Mr. Thompson cites only a few of the cases, but apparently regards them as not very sound. 3 Thompson on Corp., Sec. 4034. The two Encyclopedias cite but few cases. See 2 Pomeroy, Eq. (1st ed.), Sec. 1090.

(7) *Perry v. Pearson*, 135 Ill. 218, 25 N. E. 636.

These cases hold that directors of a corporation are trustees of the stockholders *en masse*, but not as individuals; that a confidential relation exists between them and the stockholders collectively but not singly.⁸

The doctrine of these cases has not always met with favor. Under it designing corporation officers have been able to practically "fleece" the very persons who had entrusted their interests to them. Thus in Kansas it has been held that a director or managing officer of a corporation having knowledge of the condition of the affairs of such corporation, because of the trust relation and his superior opportunities afforded for acquiring information, before he can rightfully purchase the stock of one not actively engaged in the management of its affairs, must inform such stockholder of the true condition of the affairs of the corporation.⁹ The Supreme Court of Georgia has considered this question recently in an able opinion, and which places it upon a higher plane of morality than the one of low commercialism followed in the earlier cases. Referring to the doctrine of these earlier cases, that court said: "While not decided, it is in one case suggested that a stockholder, in dealing with a director should recognize his superior opportunities for knowledge, and be warned thereby to exercise special caution. But the fiduciary relation fully warrants the opposite course. Here, at least, the beneficiary may be off guard and may rely emphatically not only on what is said, but also on the supposition that nothing important will be left unsaid, by the officer. Having previously trusted the director in its management of the company, he is not required when selling his shares, suddenly to exhibit entire want of

(8) Where the secretary of a corporation gave a stockholder all the information he had concerning the corporation's property, and then purchased stock of such holder, it was held that no such confidential relation existed between him and the holder as entitled the latter to rescind. *Krumdhaar v. Griffiths*, 151 Pa. St. 223, 25 Atl. 64; 3 Wkly. Notes Cases, 244. For cases indirectly bearing on the question, see *Johnson v. Laffin*, 5 Dill. 65; 13 Fed. Cas. 758, 765; 103 U. S. 800; *Gilbert's Case*, L. R. 5. Ch. App. 559; *Alexander v. Rollin*, 14 Mo. App. 109, 84 Mo. 657.

(9) *Stewart v. Harris*, 69 Kans. 498, 77 Pac. Rep. 277.

confidence. And directors generally recognize the obligations imposed and act accordingly."¹⁰ Still further elucidating the question, that court says: "It is a matter of common knowledge that the market value of shares rises and falls, not only because of an increase or decrease in tangible property, but by reason of real or contemplated action on the part of managing officers, upon declaring or passing dividends, upon the making of fortunate or unfortunate contracts, the loss or gain of property in dispute and on profitable or disadvantageous sales or leases; and to say that a director, who has been placed where he himself may raise or depress the value of the stock, or in a position where he first knows of facts which may produce that result, may take advantage thereof and buy from or sell to one whom he is directly representing, without making a full disclosure, and putting the stockholder on an equality of knowledge as to those facts, would offer a premium for faithless silence, and give a reward for the suppression of truth. It would sanction concealment by one who is bound to speak and permit him to take advantage of his own wrong,—a thing abhorrent to a court of conscience. It is conceded that the position which the director occupies prevents him from making personal gains at the expense of the company, or of the whole body of stockholders. But the rule that he is not trustee for the individual shareholder inevitably leads to the conclusion that, while a director is bound to serve stockholders *en masse*, he may antagonize them one by one; that he is an officer of the company, but may be the foe of each private in the ranks. When it is admitted, as it must be, both from the very nature of his duty and from the rulings of nearly all the cases, that he is trustee for the shareholder, how is it possible, in principle, to draw the line, and say that, while trustee for some purposes, he is not for others immediately connected therewith?"¹¹ It would seem that the doc-

trine of this case has met with favor in Iowa.¹²

These are cases of passive fraud. How is it in cases of active fraud, such as are represented by the two first illustrations given? Here there is no dispute in the cases upon the general proposition. They almost invariably hold the sale void at the option of the vendor. Thus where the president of a company professed a desire to aid a stockholder in selling his stock, and advised and effected a sale of it at a certain price, causing the transfer to be made to a third person whom the stockholder supposed to be the purchaser, but who really took it for the president, and afterwards transferred it to him, it was held that he was liable to the stockholder for the difference between the actual values of the stock and the price for which it was sold.¹³ And where a director misrepresented the condition of his company for the purpose of inducing a stockholder to sell him his stock, he was held liable to the vendor for the difference between the selling and actual price.¹⁴ But a mistake made in good faith concerning property owned by the company will not render the director liable.¹⁵

A stockholder owned 200 shares of the par value of one hundred dollars, on which he had paid only fifty cents a share. The defendant and the other directors, holding a majority of the shares of stock, elected the defendant, and others acting and agreeing with him, directors, and made assessment upon the subscription for stock and threatened to make others rapidly, for the purposes of the corporation, when, in fact, they were not necessary for those purposes, and which they did not intend to enforce if they could purchase the rest of the stock. The plaintiff, believing the assessments would be made and enforced, and fearing that the money would be misapplied, sold his stock for \$2.50 per share to the defendant. The assessments were not made and collected, and the stock turned

(10) *Oliver v. Oliver*, 118 Ga. 362, 45 S. E. 233; 66 L. R. A. 261.

(11) *Oliver v. Oliver*, 118 Ga. 362, 45 S. E. 232; 66 L. R. A. 261.

(12) *Hinckley v. Sac. Oil & Pipe Line Co.*, 132 La. 396, 107 N. W. 629.

(13) *Fisher v. Budlong*, 10 R. I. 525.

(14) *Hume v. Steele* (Tex.), 59 S. W. 812.

(15) *Boddy v. Henry*, 113 Ia. 462, 85 N. W. 771.

out to be of great value. It was not alleged that the defendant had concealed or misrepresented any material fact relative to the corporate property or franchises. What was represented and withheld related to the policy of the management. It was held that the sale was not void.¹⁶ But it is a fraud for the directors to vote excessive salaries to the officers of the company—or for a majority of the stockholders to do so—in order to depress the value of the stock and force other stockholders to sell to them. Usually such officers will be compelled to disgorge so much of their salaries received as is in excess of the actual value of their services, and in some instances the entire amount.¹⁷ Or they may be enjoined from receiving their salaries.¹⁸ Where a partner wilfully misrepresented the value of shares of stock in order to induce his co-partner to sell out to him his interest therein, his estate was held liable to account for the difference between the purchase price and the actual value of the stock at the time of the sale.¹⁹

Where a stockholder pledged his stock as collateral security, and the directors of the company entered into a conspiracy to depreciate the price of the company's stock, by using their powers as directors for the purpose of buying in the pledged stock for less than its value, it was held that this was a wrong, not only against the corporation, but against the pledgor for which there was a direct liability to him.²⁰ Where stock was worth only \$70 a share and a president endorsed a false statement of the company's affairs and then sold his stock for \$120 per share, it was held that the vendee was en-

titled to have the sale rescinded.²¹

In New York was decided a case which went beyond those we are now discussing. A stockholder inquired of the officers of his company concerning its financial condition. They knew he desired the information so he could determine which of two offers for his stock to accept. They made to him false representations. Acting thereon, he accepted the offer in which part of the purchase price was conditioned on the payment of dividends by the corporation. It was held that in case no dividends were paid these officers were liable to the stockholder for the difference between the sum obtained if he had accepted the offer, with the proviso he would have done so if he had known the corporation's condition. In passing on the case, the court said: "He had two courses open in selling his stock, and the defendants knew it, and he was induced to take the one from which he had suffered loss because of the fraudulent representations of defendants. It is not alone a failure to sell, but there is also an actual sale, produced by the fraud of the defendants. The damage arises from the sale at one price, coupled with the fact that the plaintiff would have sold at the other price but for the fraudulent representations of the defendants. The fact that their chief purpose was to induce, by means of these false representations, a belief on the part of the plaintiff that the company was prosperous, and that their representations were not specially and solely made to induce the plaintiff to sell his stock at one figure rather than another, is, in the light of all the facts not material. The defendants knew the reason for and the purpose of the plaintiff's inquiries, and they knew that the direct, proximate, and natural result of their fraudulent representations would in that particular case be the sale of the plaintiff's stock by him at the conditional sale at par, rather than the absolute cash one. They must, therefore be held to have intended what was the natural and direct result of their misrepresentations,

(16) *Grant v. Attrill*, 11 Fed. Rep. 469. The following case holds the same rule as those above cited; *Haarstick v. Fox*, 9 Utah, 110, 33 Pac. 251.

(17) *Eaton v. Robinson*, 19 R. I. 146, 31 Atl. 1058; 29 L. R. A. 100.

(18) *Ziegler v. Hoogland*, 52 Hun. 385, 5 N. Y. Supp. 305.

(19) *Walsham v. Stainton*, 1 De G. J. & S. 678; 9 Jur. N. S. 1261; 33 L. J. Ch. 68; 9 L. T. Rep. N. S. 357; 3 New Rep. 56; 12 Wkly. Rep. 63; 66 Eng. Ch. 527.

(20) *Ritchie v. McMullen*, 79 Fed. 522; 25 C. C. A. 50.

(21) *Prewitt v. Trimble*, 92 Ky. 176; 17 N. W. 356.

although such misrepresentations were not specially induced by a design to bring about such sale. They cannot, in such case, shelter themselves under the statement that they did not make the representations—i. e., commit the fraud—with the motive or for the purpose of inducing the plaintiff to sell his stock. They intended to deceive the plaintiff, and they were induced thereto by other causes; yet the natural, proximate, and other direct result of such deception they knew or had reasonable ground for believing would be this sale, although its accomplishment was not the particular purpose of their fraud. In such case their liability would seem to be plain."²²

It is only a question of time until the courts will be compelled to hold that a director, or the officer having access to the books and a knowledge of its internal condition, when he buys stock of a stockholder of the corporation, (or even sells his own stock to him) will be held to the duty to reveal to him the financial condition of the company, the same as if he were the special agent of the stockholder or a trustee for him. The adoption of this rule is essential to check and stop the many frauds that are daily perpetrated by corporate officers upon the stockholders of their companies. Equity and good conscience require it.

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Indianapolis, Ind.

(22) *Rothmiller v. Stein*, 143 N. Y. 581; 38 N. E. 718; 26 L. R. A. 137; affirming 29 N. Y. Supp. 707; 8 Misc. Rep. 137.

The court distinguishes the principle announced in the case of *Bradley v. Fuller*, 118 Mass. 239, saying: "What a person would have done, but did not do because (as he alleges), of the fraud of another, may not always be a matter of such vague conjecture as to render the question incapable of that degree of proof upon which courts of justice may properly act. Cases may readily suggest themselves where such possible action would be too problematical and vague to base any verdict upon it. In the case under consideration, we think the complaint states facts from which a jury ought to be permitted to decide the issue whether or not, but for the fraud, the plaintiff would have sold at the cash price."

DAMAGES—EARNING CAPACITY AND ANTICIPATORY PROFITS.

STANDARD SUPPLY CO. v. CARTER.

Supreme Court of South Carolina, Aug. 13, 1906.

One who buys an engine to furnish power for a cotton ginnery and explains to the seller the necessity of prompt delivery is, on the failure of the seller to deliver within the time fixed resulting in the ginnery remaining idle for more than 40 days of the best part of the season, entitled to recover the value of the use of the plant for such period.

WOODS, J.: The complaint alleges an indebtedness of the defendant to the plaintiff of \$317.20, the price of a lot of roofing and a 12 by 14 Clarke engine. The answer, as a counterclaim, sets up damages to the amount of \$1,995 for breach of contract of sale. The appeal is from an order of the circuit judge overruling a demurrer to the answer.

Shortly stated, the substantial allegations of the answer on which the counterclaim rests are: The defendants, merchants doing a large credit business at Elliotts, S. C., installed a cotton ginnery, so that they might not only make a direct profit from ginning cotton, but also facilitate their collections by having the first opportunity to purchase the cotton and cotton seed of their debtors. On April 12, 1906, the plaintiffs for value contracted to deliver to defendants one 12 by 14 Clarke engine on or before August 1, 1906, intended to furnish the power for defendant's ginnery for the season of 1906. The ginning season begins about the middle of August. Though fully informed of the injury that would result to defendant's business from a delay in the delivery of the engine, yet plaintiff did not deliver it until about September 26, 1906. The specifications of damage are thus set out in the answer: "The defendants were unable to operate their said ginnery for more than 40 days of the best part of the cotton ginning season of 1906, during which time a very large per cent. of the cotton crop was ginned; that the money invested in their said cotton ginning plant was idle and unproductive during said time; that by reason of their inability to operate their said cotton ginnery they were caused to lose all of the large patronage, and the profits of the same which was previously theirs, which was assured them, and which they would have gotten, during said time, part of which profits they have never recovered; that a considerable part of said patronage was persons who owed accounts to defendants, and they were deprived of the first opportunity, and in many cases of any opportunity, to buy the cotton of such debtors, which caused considerable injury to their collections; that by being thus thrown

out of the first contract with a quantity of cotton and cotton seed which would have come to their ginnery, as the same was prepared for market, they lost the purchase of the same and profits thereof; and that the good will of defendants' cotton ginning business was greatly damaged and injured by reason of said delay—all to the hurt, damage, and injury of the defendants in the sum of \$1,995."

The circuit judge was undoubtedly right in holding the allegations of the counterclaim stated a cause of action for the rental value of the ginnery plant, for the period that the plaintiffs' delay in the delivery of the engine kept it idle. It is true, as plaintiff contends, defendants cannot recover remote, contingent or speculative damages based on profits they hoped to make. *Tappan & Noble v. Harwood*, 2 Speers, 536; *Sitton v. MacDonald*, 25 S. C. 68, 60 Am. Rep. 484; *Mood v. Tel. Co.*, 40 S. C. 524, 19 S. E. 67; *Colvin v. Oil Mill*, 66 S. C. 61, 44 S. E. 380; *Hays v. Tel. Co.*, 70 S. C. 16, 48 S. E. 608, 67 L. R. A. 481, 106 Am. St. Rep. 731; *Howard v. Stillwell Co.*, 139 U. S. 199, 11 Sup. Ct. 500, 35 L. Ed. 147. But if the defendant proves his allegations that the operation of the ginnery depended on plaintiff's delivery of the engine at the time agreed on, that this was fully explained to plaintiff when the contract was made, and that the failure of the plaintiff to comply with its contract prevented the operation of the ginnery, then there cannot be a doubt of the liability of the plaintiff for the direct damages which resulted from the ginnery plant being idle. These damages would be the value of the use of the plant for the period of inactivity due to plaintiff's delay in delivering the engine. The general rule, well supported by authority and the fairest that could be adopted, is that damages for the wrongful deprivation of the use of specific property are to be measured by its rental value. *Tappan v. Harwood*, 2 Speers, 536; *Martin v. Railway Co.*, 70 S. C. 8, 48 S. E. 616; *Cannon v. Hunt*, 113 Ga. 501, 38 S. E. 983; *Griffin v. Colver*, 16 N. Y. 489, 69 Am. Dec. 718; *Brownwell v. Chapman*, 84 Iowa, 504, 51 N. W. 249, 35 Am. St. Rep. 326; *Boyle v. Reeder*, 23 N. C. 607; *Williams v. Milling Co.*, 25 Or. 573, 37 Pac. 49; *Brown v. Foster*, 51 Pa. 165; *Central Trust Co. of N. Y. v. Arctic Ice Mach. Co.*, etc., 77 Md. 202, 26 Atl. 493; *Wing v. U. S. Fidelity & G. Co.* (C. C.) 150 Fed. 672; *Hutchinson Mfg. Co. v. Pinch*, 91 Mich. 156, 51 N. W. 930, 30 Am. St. Rep. 463; *Korf v. Lull*, 70 Ill. 420; *Livermore F. & M. Co. v. Union C. & S. Co.*, 105 Tenn. 187, 58 S. W. 270, 53 L. R. A. 482.

This rule rests on the same reason as the rule that the measure of the vendee's damage for complete breach of the contract for the

delivery of goods is the difference between the contract price and the market price. That reason is that things are worth what they will bring in the market, not what the party concerned may think they ought to bring; but, when, in breach of contract for the sale of goods by a final refusal to deliver, there is no market value by which the damages may be definitely ascertained, it would be unjust and absurd to say the recovery must be limited to nominal damages. The damages then, from the necessity of the case, must be ascertained by inquiry into the value of the article to the injured party. A familiar application of this rule is the allowance to a passenger of the value to him of baggage lost by a carrier. *Turner v. Railway Co.*, 75 S. C. 58, 54 S. E. 825, 7 L. R. A. (N. S.) 188. Many other conditions to which the rule is applicable appear in the cases cited in note to *So. Exp. Co. v. Owens*, 9 A. & E. Ann. Cas. 1148, and *Todd v. Gamble*, 148 N. Y. 382, 42 N. E. 982, 52 L. R. A. 227. In *Hydraulic etc., Co. v. McHaffie*, 4 Q. B. D. 670, 13 Eng. Rul. Cas. 558, the plaintiffs were under contract to deliver a certain machine by a certain time, and the defendants contracted with them to make a certain part of the machine called a gun. Owing to the delay of the defendants in making the gun, the plaintiffs were entitled to recover from defendants the loss of their profit on the machine and their expenditures uselessly incurred in making other parts of the machine. So, also, damages for the temporary deprivation of specific property of another, due to a breach of contract, cannot be restricted to its rental value, where from any cause it has no rental value. In such cases the damages must necessarily be ascertained by an inquiry into the value of the use of the property to the injured party for the time he was deprived of it. Many cases might be cited illustrating this exception to the rule of rental value. A traveling salesman's sample trunks have no rental value, and hence, in *Strange v. Railroad Co.*, 77 S. C. 182, 57 S. E. 724, from necessity, the court laid down the rule that the measure of damages for breach of contract by delay in delivering such trunks known to be essential to the salesman's business, was his fair average daily earnings. A like measure was adopted in *Weston v. Boston & M. R. Co.*, 190 Mass. 298, 76 N. E. 1050, 4 L. R. A. (N. S.) 569, 112 Am. St. Rep. 330, to the delay in delivery of theatrical properties. Yet it is to be borne in mind the end courts always seek to attain is to give substantial and fair reparation to the injured party; and, at the same time, keep out of the administration of justice speculation and uncertainty. These ends are best attained by adhering to the market sale and rental value as closely as

possible, and adopting other measures of damages only when necessity compels because there is no substantial market value.

There is a manifest difference between the interruption of an established manufacturing plant or other business, such as a cotton mill or flour mill, in successful operation, and the prevention of the establishment of a new business. It would, in most cases of the former kind, be exceedingly unjust to limit the award of damages to what the business would rent for, because there would ordinarily be no demand for the temporary use of the business which would express, even approximately, its value to the owner. The measure, then, must be the value of its use to the owner to be ascertained by inquiry into its past results, and the most important factors in ascertaining such past results would be the usual profits earned. 3 Elliott on Evidence, §1994, and authorities there cited. When a business is in contemplation, but not established, or not in actual operation, profit merely hoped for is too uncertain and conjectural to be considered. 1 Sedg. on Damages, 174, 189; note to *Sitton v. MacDonald*, 60 Am. Rep. 488; *Williams v. Island City, etc., Co.*, 25 Or. 573, 37 Pac. 49; *Central Trust Co. v. Arctic, etc., Co.*, 77 Md. 202, 26 Atl. 493; *Paola Gas Co. v. Paola Glass Co.*, 56 Kan. 614, 44 Pac. 621, 54 Am. St. Rep. 598; *Fraser v. Echo Min. & Smelt. Co.*, 9 Tex. Civ. App. 210, 28 S. W. 714; *Howard v. Stillwell, etc., Mfg. Co.*, 139 U. S. 199, 11 Sup. Ct. 500, 35 L. Ed. 147; *Cleveland, C., C. & St. L. R. Co. v. Wood*, 189 Ill. 352, 59 N. E. 619; *Vicksburg & M. R. Co. v. Ragsdale*, 46 Miss. 458; *Figney v. Monette*, 47 La. Ann. 211, 17 South. 211.

A cotton ginnery is in operation during the harvest season only, and conditions are so liable to change from one season to another that the profit or loss of one season is only one of several factors in estimating the probable results of the next, and profit which the defendants hoped to make in the season of 1906 is too uncertain and speculative as the measure of damages. The advantage the ginnery was expected to give them in the buying of cotton and cotton seed and collecting accounts was still more contingent and speculative. It is quite possible to arrive at the fair rental value of a cotton ginnery for a cotton season. In making proof of the rental value of a ginnery which had been operated in past seasons, evidence may be offered not only of the physical condition of the property, but of all the conditions which surround it, including its patronage, and success and hazards in the past, and any change for better or worse in such conditions. All of these, and perhaps other matters, would be inquired into by those con-

templating the renting of the property, and they are therefore factors entering into the determination of the market rental value; but neither the past success indicated by the profits, nor any other single factor, is to be taken as controlling. Evidence of all these factors, along with other competent evidence, is admitted in order to arrive at the fair rental value. *Lipscomb v. Railroad Co.*, 65 S. C. 148, 43 S. E. 388; *Novelty Iron Wks. v. Oat-meal Co.*, 88 Iowa, 524, 55 N. W. 518; *Leick v. Tritz*, 94 Iowa, 322, 62 N. W. 855; *Logemann v. Pauly*, 100 Wis. 671, 76 N. W. 604; *Nelson v. Minn. & St. L. Ry. Co.*, 41 Minn. 131, 42 N. W. 788; *Mace v. Ramsey*, 74 N. C. 11; *Lavens v. Lieb*, 12 App. Div. 487, 42 N. Y. Supp. 901; *Williams v. Island City Milling Co.*, 25 Or. 573, 37 Pac. 49.

The answer states a good counterclaim for damages to be measured by the rental value of the ginnery from August 15 to September 26, 1906, the period alleged to have been lost by the plaintiff's breach of contract.

The judgment of this court is that the judgment of the circuit court overruling the demurrer be affirmed.

NOTE.—*Measure of Damages for Failure to Deliver, at Time Mentioned in Contract, an Article Having No Market Value.*—Where the time set for the delivery of an article is by the terms of the contract an important and vital element of the agreement, sufficiently so to put the vendor on notice that damage is likely to follow his failure to deliver at the time specified, in all such cases the vendee on breach of such a contract may purchase the article in open market and sue the vendor for the difference between the contract price and the market price, or where there is no market for such article the measure of damages is the rental value of such article if that can be ascertained, and if the article have no rental value the measure of damages is the value of the use of the property to the injured party for the time he was deprived of it.

The above statement is our understanding of a rule of law which is always a puzzling one and an endless subject of legal controversy. Where an article can be purchased in open market the damages for failure to deliver such an article can be easily estimated by determining the difference between the market price and the contract price. But where the article has no market price as where it is a patentable article of machinery purchasable of only the vendor the measure of damage becomes more difficult to estimate.

Actual Loss Sustained.—The rule stated generally is that when there is no market for goods which the vendor has failed to deliver in accordance with his contract the measure of damages is the actual loss sustained by the vendee in not receiving his goods at the time and in accordance with the terms of the contract.

This actual loss consists of the loss of actual profits contemplated by the parties at the time of the contract, increased freight or other charges necessitated by the vendor's delay, and finally,

damages and penalties incurred by vendee to third parties of which anticipated liability the vendor had notice. This is the rule in England arrived after full and careful discussion by the court of Queen's Bench, and after reviewing and distinguishing all the earlier authorities in the case of *Grebert-Borgnis v. Nugent*, 15 Q. B. Div. 85, 54 L. J., Q. B. 511. In this particular case A. contracted with B. for certain sheep skins, which were not procurable in the open market, to be delivered at certain times to enable A. to carry out a contract for sale of these same skins to C., at a profit of 5 francs per skin. C. sues A. and recovers £28 damages in the French court. Then A. sues B., and recovers the £34 damages represented by his loss of profit and the £28 damages he had to pay to C. The reasoning here is unanswerable and proceeds strictly upon the universal rule stated in *Hadley v. Baxendale*, to-wit: that for breach of contract the injured party is entitled to all such damages as were in the contemplation of the parties at the time of the contract. That would not include anticipated profits, but it does include profits which are fixed at the time of the contract and of which the vendor had notice; in fact the vendor is liable for any element of damage which the vendee notifies him will result from probable breach of it. On this ground the vendor was held liable in addition to profits, for damages which the vendee had been compelled to pay because the vendor had not complied with his contract. When, however, certain penalties will be, and are incurred by the vendee by reason of the failure of vendor to deliver the goods contracted for, which are not made known to the vendor at the time the contract is entered into, the vendee cannot recover the amount of such penalties because they could not be said to arise "naturally," and were not in the contemplation of the parties at the time of the contract. *Borries v. Hutchinson*, 18 C. B. (N. S.) 445. In the last case, however, the vendee was permitted to recover for increased freight rates (in winter), over what he would have had to pay in summer, the time called for in the contract, there being a usual difference in the rates between the two seasons.

It is to be borne in mind, however, that the amount of damages in the way of penalty, or otherwise, the vendee may suffer in a suit at the hands of some third party are not absolutely the measure of damages against the vendor, but such amount so incurred by the vendee may be considered by the jury, or the court, in estimating the damages which the plaintiff is entitled to recover. *Elbinger Actien-Gesellschaft v. Armstrong*, L. R. 9 Q. B. 473.

In some cases the actual loss represents the increased cost for a different article to supply the same purpose. *Hinde v. Liddell*, L. R. 10 Q. B. 265. In this case the plaintiff was allowed to recover the difference between the contract price and what he had to pay for goods of a superior description, which he got by way of substitute, there being no market for goods of the description contracted for.

American authorities as a rule support the same principles as announced by the English cases. *Jordan v. Patterson*, 67 Conn. 373; *Culin v. Glass Works*, 108 Pa. 81, 220; *Illinois-Central R. R. v. Cobb*, 64 Ill. 128; *Vickery v. McCormick*, 117 Ind. 594, 20 N. E. 495. But see the case of

Snell v. Cottingham, 72 Ill. 161, which restricts the rule to an extent not agreed to by the English authorities, to-wit: that in addition to notice of penalties and special damages to the vendee not arising "naturally," the vendor must also agree to assume the responsibility for such conditions before he can be held liable.

A very recent case on this question is that of *Hoskins v. Scott* (Oreg.), 96 Pac. 1112, where it was held that the measure of damages for delay in delivering the plaintiff an engine to operate a threshing machine in time for the grain season, was not the profits which plaintiff "anticipated" unless he had actual contracts upon which such profits could be accurately estimated; otherwise the profits would be "too speculative."

Rental Value.—Where a particular article or machinery is purchased not for resale but for a particular use at a time certain, and there is a delay in sending the article so contracted for, the measure of damages is the rental value of the article during the time of the delay. Thus in *Mace v. Ramsey*, 74 N. C. 11, where A. agreed to furnish B. with an excursion boat to be used for a particular day, the rental value of the boat on such a day was to be determined by taking into view the number of people who had already contracted for passage, the state of the weather, the size of the crowd, etc. One of the leading cases is that of *Central Trust Co. v. Artic Ice Machine Mfg. Co.*, 77 Md. 202, 79 Md. 103, 29 Atl. 69. In this case there was a contract to erect ice machines in the spring of 1890, which were not erected until November, 1890, a delay over the most valuable season of an exceedingly valuable year, the winter of 1889-90, being very mild resulting in a scarcity of natural ice. The estimated profits of the ice company were excluded from the computation of damages, and the measure of damages was stated to be "the rental value of like machines of equal capacity from the dates they ought to have been in operation to the time of acceptance," and the jury was permitted to add to the "average rental value" of such machines their increased value during such a year as 1890.

Referring again to the recent case of *Hoskins v. Scott*, supra, which related to delay in furnishing an engine to run a threshing machine for an independent operator, the court stated the rule to be that plaintiff was entitled to show as general damages the rental value of the machine during the season, if idle by reason of lack of the power contracted for, provided plaintiff was unable to procure an engine elsewhere; but, if an engine was procured elsewhere, he would be entitled to show, in lieu of the rental value, the difference between what he was to pay defendant and what he was compelled to pay others, including expenses incidental to the change.

HUMOR OF THE LAW.

"Your honor," said the lawyer, "I ask the dismissal of my client on the ground that the warrant fails to state that he hit Bill Jones with malicious intent."

"This court," replied the country justice, "ain't a graduate of none of your technical schools, I don't care what he hit Bill with. The p'int is, did he hit him? Perceed."

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1. **Adoption**—Consent of Parents.—The adoption of a child on the consent of the mother alone held invalid under the statute, which requires the consent of both parents.—*Willis v. Bell*, Ark., 111 S. W. Rep. 808.

2. **Appeal and Error**—Change of Venue.—In mandamus to compel a change of venue, such matters in the petition and brief for relator as were not presented to respondent, and not within the grounds assigned in the motion, will not be considered by this court on appeal.—*Glasier v. Ingham* Circuit Judge, Mich., 116 N. W. Rep. 1007.

3. **Determination of Exceptions**.—Where a trustee in bankruptcy, superseding an assignee in insolvency, had notice of exceptions taken by the bankrupt in an action against him in the state court, such exceptions will be overruled where neither the trustee nor the defendant appears.—*Head & Dowst Co. v. New England Breeders' Club*, N. H., 70 Atl. Rep. 248.

4. **Prejudice**.—Appellee was not prejudiced by appellant's failure to file briefs within the time required, where ample time remained for the filing of briefs before the case could be reached for submission.—*Peoples v. Evans*, Tex., 111 S. W. Rep. 756.

5. **Relevancy of Evidence**.—The Court of Errors and Appeals, with a view to determining only the relevancy of evidence, will regard as the issue of fact that which was treated as such by the parties below.—*Axel v. Kraemer*, N. J., 70 Atl. Rep. 367.

6. **Subsequent Appeals**.—A question decided by the Supreme Court of the territory of Oklahoma becomes the law of the case, and will not be reversed by the Supreme Court

of the state on a subsequent appeal.—*Oklahoma City Electric, Gas & Power Co. v. Baumhoff*, Okl., 96 Pac. Rep. 758.

7. **Assignments**—Right of Action.—An assignee of chose in action can bring suit in his own name or in the name of his assignor.—*Rogers v. Brown*, Me., 70 Atl. Rep. 206.

8. **Bail**—Jurisdiction to Admit to Bail.—A bail bond executed after arrest on a warrant issued on a complaint filed with the county clerk and before an information was filed is a nullity, and will not support scire facias.—*Baker v. State*, Tex., 111 S. W. Rep. 735.

9. **Banks and Banking**—Contracts.—A note by a bank organized under the laws of the territory of Oklahoma as subscription to secure the construction of a railroad is ultra vires and void.—*Arkansas Valley & W. Ry. Co. v. Farmers' & Merchants' Bank*, Okl., 96 Pac. Rep. 765.

10. **Benefit Societies**—Membership.—The expulsion of a member from a fraternal benefit association without notice or opportunity to be heard is void.—*State v. Corgia*, Wash., 96 Pac. Rep. 689.

11. **Notice of Sickness**.—Any defect in notice of sickness of a member of a beneficial society held waived by the notice being acted on.—*Clark v. Star of Hope Lodge No. 12*, Order of Shepherds of Bethlehem, Conn., 70 Atl. Rep. 588.

12. **Bills and Notes**—Defenses.—Payment of a note by the maker to the payee, with knowledge that the note had been transferred to plaintiffs as collateral security, held no defense to plaintiffs' right to enforce payment from the maker.—*Landa v. Mechler*, Tex., 111 S. W. Rep. 752.

13. **Brokers**—Action for Services Rendered.—In an action for renting agent's services, whether a payment of 5 per cent. of an installment of rent collected was in full for his services, or a recognition that he was entitled to 5 per cent. of all the rents collected, held for the jury.—*Colloty v. Schuman*, N. J., 70 Atl. Rep. 190.

14. **Commissions**.—In an action by a broker employed to procure a purchaser of real estate for his commissions, it is not error to allow defendant to prove by plaintiff's testimony that no sale of the premises had in fact been made.—*Runck v. Dimmick*, Tex., 111 S. W. Rep. 779.

15. **Commissions**.—Where a sale was made to a purchaser procured by a broker at a price less than that specified in the broker's contract, the broker was not entitled to contract commissions, but only to reasonable compensation.—*Schultz v. Zelman*, Tex., 111 S. W. Rep. 776.

16. **Right to Commissions**.—Where a broker has acted for both parties, he must show, in order to recover commissions from the seller, that both the seller and the purchaser knew of his double agency.—*Dennison v. Gault*, Mo., 111 S. W. Rep. 844.

17. **Carriers**—Interstate Commerce.—Act 1904 (Laws 1904, p. 671), prohibiting delay in transportation of freight by railroads in the state, subject to a penalty, held not to apply to a transportation partly out of the state; the delay being wholly out of the state.—*Hunter v. Charleston & W. C. Ry. Co.*, S. C., 62 S. E. Rep. 13.

18. **Questions for Jury**.—Where goods ordered reshipped by a seller to himself did not arrive until nearly three months after the date

of the waybill, though the seller had been informed that the goods would arrive in three or four days, it was not proper to leave it to the jury to find that the goods had arrived in due course.—*Seaboard Air Line Ry. Co. v. Phillips*, Md., 70 Atl. Rep. 232.

19.—**Transportation of Cattle.**—Where, on a carrier's failure to promptly provide cars for the shipment of cattle, the owners crowded them into a wagon yard, too small to hold them, where they injured themselves, the owners' act, and not the default of the carrier, was the proximate cause of such injuries.—*Missouri, K. & T. Ry. Co. of Texas v. Lewellen Bros.*, Tex., 111 S. W. Rep. 773.

20.—**Clerks of Courts—Recording Judgment.**—The district court cannot compel its clerk to record a judgment or decree on its journal or make a complete record in a case without payment of fees in advance or security therefor.—*State v. Several Parcels of Land*, Neb., 117 N. W. Rep. 450.

21.—**Commerce—Intoxicating Liquors.**—Under the Wilson Act, Pen. Code, 1895, sec. 428, prohibiting the solicitation of orders for intoxicating liquors in a prohibition county, held not void as regulation of interstate commerce.—*Rose v. State*, Ga., 62 S. E. Rep. 117.

22.—**Constitutional Law—Grant of Power.**—Where a power is expressly given by the Constitution and the means by or the manner in which it is to be exercised is prescribed, such means or manner is exclusive of all others.—*Parks v. West*, Tex., 111 S. W. Rep. 726.

23.—**Due Process of Law—Act approved August 17, 1903, regulating the sale of a stock of goods in bulk, held not violative of Const. art. 1, § 1, par. 3, or Const. U. S. Amend. 14, as not due process of law.**—*Jaques & Tinsley Co. v. Carstarphen Warehouse Co.*, Ga., 62 S. E. Rep. 82.

24.—**Contempt—Acts Constituting.**—The court will not punish for contempt one, who has violated Sess. Laws 1905, p. 157, c. 77, relating to practicing law without a license, where the person accused violated the statute ignorantly, and had in good faith applied for admission to the bar.—*People v. Ellis*, Colo., 96 Pac. Rep. 783.

25.—**Contracts—Extra Work.**—Where a building contract does not provide for compensation for extra work, and, the contract being under seal, the extra work must be sued for in assumpsit, the contract compensation will control as to the extra work where practicable.—*Harrison v. McLaughlin Bros.*, Md., 70 Atl. Rep. 424.

26.—**Performance.**—An agreement by which a party is to execute a bond to the adverse party, to his satisfaction, means that if, in the exercise of his judgment, acting on the best information conveniently within his reach, the adverse party in good faith concludes that the bond is not sufficient, the party is bound thereby.—*Goldberg v. Feldman*, Md., 70 Atl. Rep. 245.

27.—**Corporations—Corporate Name.**—The use of the word "Edisonia" in the name of defendant corporation, "Mills-Edisonia," held not an infringement of any property-rights of complainant, Edison, or the corporations manufacturing such machines, or of a personal right in complainant, Edison, for the use of his name.—*Edison v. Mills-Edisonia*, N. J., 70 Atl. Rep. 191.

28.—**Pledge of Stock.**—A pledgee of corporate stock who forecloses the certificate and obtains judgment foreclosing the rights of all persons interested in such stock held not entitled to withdraw the certificate as an exhibit to the petition.—*American Bonding Co. v. Loeb*, Wash., 96 Pac. Rep. 692.

29.—**Receivers.**—A court of equity has no jurisdiction to undertake the management of a private corporation as a going concern in order to pay its creditors.—*Cronan v. District Court of Kootenai County*, Idaho, 96 Pac. Rep. 768.

30.—**Receivers.**—That the directors disagree among themselves as to whether the business shall be conducted on a cash basis or not is not sufficient to warrant the appointment of a receiver at the suit of a stockholder.—*Jacobs v. Jacobs Mercantile Co.*, Mont., 96 Pac. Rep. 723.

31.—**Sale of Corporate Property to Director.**—Relief against a sale of corporate property to a director will be granted to a single stockholder who, by reason of infancy, is not chargeable with laches, though the other stockholders may be thereby debarred.—*Marr v. Marr*, N. J., 70 Atl. Rep. 375.

32.—**Criminal Evidence—Other Offenses.**—On a prosecution for the theft of money, held not error to admit proof that accused was in possession of other articles claimed to have been stolen, to show his presence at the scene of the theft, and as a circumstance tending to connect him therewith.—*Lynne v. State*, Tex., 111 S. W. Rep. 729.

33.—**Criminal Law—Alibi.**—After the state had offered testimony fixing the date of the crime as charged in the information, defendant could prove an alibi by showing it was impossible for him to commit the crime on that date.—*State v. Ferris*, Conn., 70 Atl. Rep. 587.

34.—**Arrest.**—An officer may, without warrant, arrest a suspected felon and subject him to reasonable search, and evidence so obtained is not inadmissible.—*Eaker v. State*, Ga., 62 S. E. Rep. 99.

35.—**Criminal Trial—Acts Showing System or Habit.**—Where a crime is committed by the use of novel means or in a particular manner, evidence that accused has committed similar offenses in the same manner is admissible to prove the identity of persons from the similarity of the means adopted in committing the crime.—*Morse v. Commonwealth*, Ky., 111 S. W. Rep. 714.

36.—**Disorderly House.**—In a trial for keeping a disorderly house, the state could show conversations between men and women at such house, in accused's absence; all acts and conduct of the inmates being part of the *res gestae*.—*State v. Kelly*, N. J., 70 Atl. Rep. 342.

37.—**Damages—Injury to Person and Property.**—Where plaintiff and his horse were injured by a defect in a city street, he should be allowed reasonable compensation for his injuries, for his pain and suffering, loss of time and expenses, and also for injuries to the horse.—*Anderson v. City of Wilmington*, Del., 70 Atl. Rep. 204.

38.—**Mortality Tables.**—It is not indispensable to an ascertainment of the diminished capacity of an employee to earn money that the jury should have before them the standard

mortality tables.—*Merchants' & Miners' Transp. Co. v. Corcoran, Ga., 62 S. E. Rep. 130.*

39. **Dead Bodies**—Right to Disinter.—Widow held not entitled to disinter body of deceased husband after proper burial by next of kin.—*Litteral v. Litteral, Mo., 111 S. W. Rep. 872.*

40. **Deeds**—Delivery and Acceptance.—Whether property has been conveyed for the purpose of defrauding the creditors of the grantor depends on whether the deed transferring such property was ever delivered and accepted by the grantee.—*Bowers v. Cottrell, Idaho, 96 Pac. Rep. 936.*

41. **Divorce**—Cross-bills.—In an action for divorce, defendant may file a cross-bill and ask independent relief, and, when he does so, his suit is as distinct from that of plaintiff as if she had brought no suit, and the finding of the court should be on each separately.—*Slocum v. Slocum, Ark., 111 S. W. Rep. 806.*

42.—Property Previously Conveyed.—Where plaintiff's husband held the legal title to land when he conveyed it to defendant, plaintiff cannot thereafter acquire the legal title, either by voluntary conveyance from her husband or by a decree transferring the tract to her in divorce proceedings.—*Senkler v. Berry, Or., 96 Pac. Rep. 1070.*

43. **Drains**—Creation of Indebtedness in Advance.—The officials of a drainage district have no authority to create in advance an indebtedness for work in the district, and then levy an assessment to meet such indebtedness.—*Schafer v. Gerbers, Ill., 84 N. E. Rep. 1064.*

44. **Easements**—Right of Way.—If a right of way over another's land by permission may ever become one of right by hostile use, the period when it was used by permission cannot be tacked to the period of hostility to make the statutory period.—*Moore v. Bulgreen, Mich., 116 N. W. Rep. 1005.*

45. **Electricity**—Places Attractive to Children.—An electric light company held not liable for death of a child, where its wires were 18 feet above the street and were reached by the child by climbing.—*Mayfield Water & Light Co. v. Webb's Adm'r, Ky., 111 S. W. Rep. 712.*

46. **Embezzlement**—Indictment.—Though an indictment for embezzlement charged the taking of a certain sum, a conviction may be had on proof of the embezzlement of a less sum.—*Morse v. Commonwealth, Ky., 111 S. W. Rep. 714.*

47. **Eminent Domain**—Damages.—Enhancement of value of city property from the building of a railroad into the city and the construction of the main track, and erection of a depot near the property, held not a benefit to be set-off against the damages to the property from the building of a spur track.—*Eastern Texas R. Co. v. Eddings, Tex., 111 S. W. Rep. 777.*

48. **Estoppel**—Burden of Proof.—The burden is on parties who would rely on the fruits of an election to treat a mortgage as invalid to show a course of conduct inconsistent with a right asserted under it.—*First Nat. Bank v. Farmers' & Merchants' Nat. Bank of Wabash, Ind., 84 N. E. Rep. 1077.*

49. **Evidence**—Assignment of Mortgage.—An assignment of a mortgage held to notify the assignee that the assignor held it in his capacity of executor.—*Alexander v. Fidelity & Deposit Co., Md., 70 Atl. Rep. 209.*

50.—Expert Testimony.—A physician held competent to testify in answer to a hypothetical question that plaintiff's injury could have been the cause of the affection of which plaintiff was suffering when the physician examined him.—*Anderson v. City of Wilmington, Del., 70 Atl. Rep. 204.*

51.—Foundation for Secondary Evidence.—A copy or parol testimony to show the contents of a letter is inadmissible, where there is no evidence tending to show the loss or destruction of the letter itself or any effort to secure its production.—*Seaboard Air Line Ry. Co. v. Phillips, Md., 70 Atl. Rep. 232.*

52.—Proof of Agency.—The rule that neither agency nor the extent of authority can be proved by the "declarations" of the alleged agent does prevent an alleged agent from testifying to the fact of agency.—*Wales v. Mower, Colo., 96 Pac. Rep. 971.*

53. **Execution**—Sale of Assets.—A distributee cannot bind another distributee by directions authorizing the administrator to sell assets at private sale without order of court.—*State v. Dickson, Mo., 111 S. W. Rep. 817.*

54. **Executors and Administrators**—Breach of Bond.—An administrator breached a bond given on procuring an order to sell land where he refused to pay the proceeds into court for distribution among intestate's creditors.—*Moore v. State, Ind., 84 N. E. Rep. 1096.*

55. **Explosives**—Injuries from Blasting.—Where a person explodes blasts which cause the surrounding earth to vibrate so as to crack and shatter the walls of a house and project stones against it, he is guilty of an actionable trespass, regardless of the degree of care he employs.—*Faust v. Pope, Mo., 111 S. W. Rep. 878.*

56. **False Pretenses**—Fraudulent Checks.—Under B. & C. Comp. sec. 4463, held not essential to one's guilt of obtaining money by false pretenses by drawing a fraudulent check that he made any other representation respecting it than that implied from his act in drawing the check.—*State v. Hammelsy, Or., 96 Pac. Rep. 865.*

57. **Fish**—Rights in Navigable Waters.—A right to fish in the navigable waters of the state is a public right, for injury to which an action for damages will lie.—*Ainsworth v. Munoskong Hunting & Fishing Club, Mich., 116 N. W. Rep. 992.*

58. **Forgery**—What Constitutes.—Changing a writing from a non-negotiable instrument into a negotiable note is such a material alteration as constitutes forgery, where done with criminal intent.—*State v. Mitton, Mont., 96 Pac. Rep. 926.*

59. **Fraud**—Evidence.—A defendant setting up fraud by actual misrepresentations cannot, on failing to prove the misrepresentations, avail himself of fraud by silence.—*American Surety Co. v. Pacific Surety Co., Conn., 70 Atl. Rep. 584.*

60. **Game**—Right to Hunt on Navigable Waters.—The right to hunt ducks on the navigable waters of the state is a public right of which any citizen may avail himself, subject to the game laws of the state.—*Ainsworth v. Munoskong Hunting & Fishing Club, Mich., 116 N. W. Rep. 992.*

61. **Garnishment**—Property Subject.—A debt due by a resident to a nonresident may be reached by garnishment on a tax execution issued by a tax collector for a special tax due

by such nonresident.—*A. B. Baxter & Co. v. Andrews, Ga.*, 62 S. E. Rep. 42.

62. **Good Will**—Sale by Professional Man.—The sale of the good will of a professional man carries with it the obligation that he will abstain from practice in the future in the territory from which he thus binds himself to withdraw.—*Yeakley v. Gaston, Tex.*, 111 S. W. Rep. 768.

63. **Habeas Corpus**—Conclusiveness of Judgment.—Judgments and decrees awarding custody of infant children in habeas corpus are temporary, and apply only to the facts and conditions then existing, and do not necessarily affect further proceedings under changed conditions.—*Willis v. Bell, Ark.*, 111 S. W. Rep. 808.

64.—Custody of Infants.—Discretion of court should be governed by rules of law and be exercised in favor of the party having the legal right, unless the evidence shows that the interest of the child justifies the judge in awarding its custody to another.—*Sloan v. Jones, Ga.*, 62 S. E. Rep. 21.

65. **Highways**—Obstruction.—That town officers opened a roadway by cutting brush, believing that it followed a section line over which a highway had been laid, held not to place on defendant, in an action for obstructing the same, the burden of proving that it was not a public highway.—*Town of Bellevue v. Hunter, Minn.*, 117 N. W. Rep. 445.

66. **Homestead**—Abandonment.—A homestead may be leased during the temporary absence of the owner, without an abandonment of homestead rights.—*Snodgrass v. Copple, Mo.*, 111 S. W. Rep. 845.

67.—Devise by Widow.—Where a widow, having no interest in the homestead other than that which she might have acquired as distributee of her husband's estate, devised the land to one of her children as sole legatee, he obtained no interest in the land as against the other heirs, except as to the special interest of the widow.—*Darsey v. Darsey, Ga.*, 62 S. E. Rep. 20.

68. **Homicide**—Justification.—A husband held not justified in killing or attempting to kill another to prevent the seduction of his wife by artifice or fraud.—*State v. Young, Or.*, 96 Pac. Rep. 1067.

69. **Husband and Wife**—Community Property.—A survivor in a community, having filed his bond, inventory, and appraisal, and the same having been approved, has no authority to procure a decree of the county court settling the same.—*Check v. Hart, Tex.*, 111 S. W. Rep. 775.

70.—Community Property.—Where persons lived together without lawful marriage, both being fully aware of their meretricious relations, and in view of such relations their property was kept separate and apart, the heirs of the woman by a former husband have no right or interest in the property acquired by the man, the title having been taken in his name, but claimed to be community property.—In re *Sloan's Estate, Wash.*, 96 Pac. Rep. 684.

71.—Sale of Land by Wife.—Married woman unable to perform contract to sell land because of refusal of husband to join must return to the vendee moneys paid and reimbursing him for expenses.—*McCoy v. Niblick, Pa.*, 70 Atl. Rep. 577.

72.—Wife's Earnings.—A wife's earnings may be her separate property by agree-

ment with her husband, or because of her living separate from him.—*Greve v. Echo Oil Co., Cal.*, 96 Pac. Rep. 904.

73. **Indictments and Information**—Objections to Grand Jury.—If it should have appeared of record that grand jurors who found an indictment were duly returned by the sheriff, accused should have taken his objection by challenge to the grand jury rather than by attacking the indictment.—*State v. Kelly, N. J.*, 70 Atl. Rep. 342.

74. **Injunction**—Infringement of Private Rights.—If no private rights are infringed by the erection of a livery stable in a city, the fact that its erection is in violation of a city ordinance is not a ground for enjoining its erection.—*Mason v. Deitering, Mo.*, 111 S. W. Rep. 862.

75.—Jurisdiction.—Bill to compel school board of a city to carry out its contract with competing architects for a school building held maintainable.—*Palmer v. Central Board of Education of City of Pittsburg, Pa.*, 70 Atl. Rep. 433.

76.—When Granted.—On a bill against municipal contractor and city to enjoin payment by the city to the contractor of moneys due under contract, held, plaintiff was entitled to an injunction until a suit for an accounting between him and the contractor was determined.—*Watson v. McManus, Pa.*, 70 Atl. Rep. 263.

77. **Intoxicating Liquors**—Local Option.—In the absence of inconsistent legislation, when a new district is carved out of an old district, the local option law existing therein held to continue in the new district.—*Amerker v. Taylor, S. C.*, 62 S. E. Rep. 7.

78. **Judgment**—Parties Bound.—Where a grantor of realty, to protect himself from liability, defends an action by a third person against his grantee, though not a party, he is bound by the judgment, but his personal obligation to pay and discharge the same extends only to his grantee.—*Hendricks v. Dean, Minn.*, 117 N. W. Rep. 426.

79. **Justices of the Peace**—Appeal.—In cases arising before a justice of the peace appealed to the circuit court, the latter's jurisdiction is appellate, and, if the justice's court had no jurisdiction, the circuit court can have none, nor can it on appeal render a judgment in an amount which the justice for lack of jurisdiction could not have rendered.—*Saunders v. Scott, Mo.*, 111 S. W. Rep. 874.

80. **Landlord and Tenant**—Action for Rent.—In an action for rent of a store, breach of plaintiff's covenant to keep the building dry, whereby defendants were obliged to vacate it, held to constitute an eviction and terminated defendants' liability to pay rent.—*Viehman v. Boelter, Minn.*, 116 N. W. Rep. 1023.

81. **Life Insurance**—Payment of Premium.—Waiver by insurance company of payment of premiums for a specified time held available to insured only when payment or loss occurred within that time.—*Weston v. State Mut. Life Assur. Co. of Worcester, Ill.*, 84 N. E. Rep. 1073.

82. **Limitation of Actions**—Bar of Debt as Affording Security.—Where a note given for the purchase price of land, containing no reservation of a vendor's lien, is barred by the statute of limitations, the vendor or holder of the note has no longer any claim on or interest in the land.—*Laird v. Murráy, Tex.*, 111 S. W. Rep. 780.

83. Lost Instruments—Deeds.—Where a lost deed is shown to have been executed, it will be presumed, in the absence of evidence to the contrary, that it was executed with due formality, including the acknowledgment of a married woman.—*Laird v. Murray*, Tex., 111 S. W. Rep. 780.

84. Marriage—Estoppel.—As between husband and wife and parent and child, there can be no estoppel to deny the validity of the marriage.—*In re Sloan's Estate*, Wash., 98 Pac. Rep. 684.

85. Master and Servant—Assumed Risk.—Motorman of a railway car held not to have assumed the risk of the danger of collision resulting from the railroad company's failure to notify the operatives of the other car of the sending out of the car of which plaintiff had charge.—*Graham v. Mattoon City Ry. Co.*, Ill., 84 N. E. Rep. 1070.

86.—Assumption of Risk.—That a servant took a position which was dangerous for a certain reason held not to relieve the master from liability for negligent acts of its foreman, which had no connection with such danger, and which caused the servant's injury.—*Howland v. Standard Milling & Logging Co.*, Wash., 96 Pac. Rep. 686.

87.—Defective Appliances.—An employee may show notice to employer of dangerous appliance, and that he relied on his promise to repair.—*Hollis v. Widener*, Pa., 70 Atl. Rep. 287.

88.—Fellow Servants.—The conductor and motorman of a street car, being fellow servants, owed to each other a much less degree of care to prevent injury from obstruction in the street than they owe to passengers.—*Hinckley v. City of Danbury*, Conn., 70 Atl. Rep. 590.

89. Mines and Minerals—Improvement Charges.—The reasonable value of meals furnished men employed in doing development work in a mine who received board in addition to their wages should augment the earnings of the men employed, but the money expended in transporting the supplies is not a proper charge for development work.—*Fredericks v. Klausner*, Or., 96 Pac. Rep. 679.

90. Mortgages—Redemption from Prior Redemptioner.—One who is not made by statute a redemptioner, but acquires the rights of a redemptioner, must permit a lawful redemptioner to redeem from him within the period given by statute to a subsequent lienholder.—*North Dakota Horse & Cattle Co. v. Surumgard*, N. D., 117 N. W. Rep. 453.

91. Municipal Corporations—Defective Streets.—A city is not liable for injuries occasioned by holes in the streets resulting from sudden storms or wash-outs until it has had a reasonable time to fill or repair the defect.—*Anderson v. City of Wilmington*, Del., 70 Atl. Rep. 204.

92.—Defective Streets.—A city held primarily liable for defects in sidewalks, caused by its own negligence, and liable for defects caused by the negligence of another on notice thereof for a sufficient length of time to have cured them.—*City & County of Denver v. Magivney*, Colo., 96 Pac. Rep. 1002.

93.—Donation or Appropriation of Public Funds.—Payment by the city of a recognized moral obligation assumed by it for services rendered at its request held not a donation or appropriation of public funds within the prohibition of Const. art. 1, secs. 19, 20.—*Morris &*

E. R. Co. v. City of Newark, N. J., 70 Atl. Rep. 194.

94.—Liabilities on Official Bond.—A defect in the title of one to the office of treasurer of a city cannot be inquired into in an action by the state for the use of the city on the official bond, of his predecessor in office, for failing to pay over money in his hands as such officer.—*State v. Fahey*, Md., 70 Atl. Rep. 218.

95.—Suspension of Policeman.—A rule of the police department as to a forfeiture of pay for absence from duty has no reference to a policeman suspended pending an investigation.—*Rees v. City of Minneapolis*, Minn., 117 N. W. Rep. 432.

96.—Use of Streets by Pedestrian.—In an action for the death of a pedestrian on a street killed by contact with an electrically charged wire in the street, instructions held properly refused as amounting to a ruling as a matter of law on a question of fact and as improperly limiting a traveler's right to the use of the highway.—*Lydston v. Rockingham County Light & Power Co.*, N. H., 70 Atl. Rep. 285.

97. Negligence—Places Attractive to Children.—An electric wire, 18 feet above the ground, which could only be reached by climbing a pole or guy wires stretched from a pole to the ground at an angle of 45 degrees, was not a dangerous instrumentality attractive or alluring to children.—*Mayfield Water & Light Co. v. Webb's Adm'r.*, Ky., 111 S. W. Rep. 712.

98. Partnership—Admissions of Partner.—Testimony that an account against a firm was presented to a member, and he acknowledged its correctness, is prima facie proof thereof, and on a denial by the firm makes an issue for the jury.—*G. H. Dolvin & Co. v. Hicks*, Ga., 62 S. E. Rep. 95.

99. Patents—Description by Name of Patentee.—Where defendant properly acquired title to and possession of certain Edison phonographs and kinetoscopes, it was entitled to use them for public entertainment, and to describe and advertise that the machines used were Edison machines.—*Edison v. Mills-Edison*, N. J., 70 Atl. Rep. 191.

100. Pledges—Conversion by Pledgee.—A note payable one day after date, and reciting the deposit with the payee as collateral security of certain shares of stock, held not vague or uncertain in that it could not be determined what the agreement as to sale of the collateral security was, or when the time to redeem the collaterals had expired.—*Drake v. Pueblo Nat. Bank*, Colo., 96 Pac. Rep. 999.

101.—Enforcement of Pledged Note.—In an action by the pledgee of a note against the maker the defense being payment to the corporation pledgor, the act of the pledgee in suing the maker was a repudiation of the act of the pledgor in receiving payment as binding on plaintiff.—*Landa v. Mechler*, Tex., 111 S. W. Rep. 752.

102. Principal and Surety—Extension of Time for Payment.—An agreement executed by a grantor in a trust deed given to secure the debt of another held to authorize the extension of the time of the payment of the debt without affecting the lien of the trust deed.—*Prussing v. Lancaster*, Ill., 84 N. E. Rep. 1062.

103. Public Lands—Actual Settler.—One who makes his home on public lands is an "actual settler" thereon, within the statute permitting

such settlers to purchase additional school lands, though his habitation is such that it can hardly be called a house.—*Corrigan v. Fitzsimmons*, Tex., 111 S. W. Rep. 793.

104. **Railroads**.—Duty of Engineer.—An engineer is not required to check the speed of his train merely because an animal may be near the track.—*Rio Grande Western Ry. Co. v. Boyd*, Colo., 96 Pac. Rep. 781.

105. **Injury to Licensees**.—Where a railroad company places a car on a side track to be unloaded, it is negligence to switch cars against the loaded car without a warning to persons unloading freight therefrom.—*Ekert v. Great Northern Ry. Co.*, Minn., 116 N. W. Rep. 1024.

106. **Receivers**.—State Dental Board.—The state dental board refusing to pay a judgment against it, held, that a receivership is a proper mode to compel the payment.—*Stern v. State Board of Dental Examiners*, Wash., 96 Pac. Rep. 693.

107. **Release**.—Validity.—An employee seeking to avoid a settlement of his claim for injuries and recover therefor on the ground of certain fraud practiced by the employer held not required to tender back the consideration received on the settlement.—*Illinois Cent. R. Co. v. Vaughn*, Ky., 111 S. W. Rep. 707.

108. **Sales**.—Delivery.—A consignment of goods to the consignor's own order, to be delivered to the buyer only upon his payment of drafts attached to the bills of lading, held not a performance of a contract to deliver to the buyer.—*Hunter Bros. v. Stanley*, Mo., 111 S. W. Rep. 869.

109. **Specific Performance**.—Pleadings.—A complaint for specific performance need not plead a tender, where it shows that defendant had refused to carry out the terms of the contract, and that it would have been useless.—*Long v. Needham*, Mont., 96 Pac. Rep. 731.

110. **Specific Performance**.—Time as the Essence.—Ordinarily, if time is not of the essence of a contract to convey, it is sufficient if the vendor can give clear title at the date of a decree to compel the purchaser to specifically perform, though the vendor has no clear title when the bill is brought.—*Agens v. Koch*, N. J., 70 Atl. Rep. 348.

111. **Statutes**.—Re-enactment.—The re-enactment of a statute without change is, in the absence of weighty evidence to the contrary, an adoption of a previous judicial construction.—*Wyatt v. State Board of Equalization*, N. H., 70 Atl. Rep. 387.

112. **Street Railroads**.—Excessive Speed.—If a street railway company, sued for injury caused by its car striking a wagon while being run at a speed exceeding the speed limit, desired to rely on facts justifying the excessive speed, it should have pleaded such facts.—*Engelker v. Seattle Electric Co.*, Wash., 96 Pac. Rep. 1039.

113. **Taxation**.—Exemptions.—While the Legislature may select the subject of taxation, and thereby exempt classes of property not named, it cannot limit the proportion to be paid by particular property.—*Wyatt v. State Board of Equalization*, N. H., 70 Atl. Rep. 387.

114. **Trade-Marks and Trade-Names**.—Use of Inventor's Name.—A corporation lawfully using machines, the invention of an individual, has authority, implied from the purchase of the machines from the inventor or his grantees, to

use the name of the inventor for the purpose of truly and properly describing the machines.—*Edison v. Mills-Edison*, N. J., 70 Atl. Rep. 191.

115. **Trial**.—Taking Question from Jury.—When the proof is so weak that a verdict for plaintiff would be properly set aside, it is within the court's discretion to instruct the jury not to consider the evidence.—*Hinckley v. City of Danbury*, Conn., 70 Atl. Rep. 590.

116. **Trusts**.—Negligence.—Where through the negligence of a trustee his co-trustee is permitted to convert the trust funds to his own use, the failure to exercise diligence renders him liable for the loss.—*In re Adams' Estate*, Pa., 70 Atl. Rep. 436.

117. **Usury**.—What Constitutes.—One P. had several contracts with the city, under which money was to accrue for work performed, and assigned the money due under the contracts; the amount paid him being some 10 per cent. less than the face value. Held not usurious.—*Dickson v. City of St. Paul*, Minn., 117 N. W. Rep. 426.

118. **Venue**.—Water and Water Courses.—Where, by the construction of a dam in one county, water is unlawfully backed on lands lying in another county, the venue may be laid in either county.—*Defiance Fruit Co. v. Fox*, N. J., 70 Atl. Rep. 460.

119. **Waters and Water Courses**.—Artesian Wells.—Where a city water supply company employs the most approved method to secure water from an artesian basin, if thereby the head of another's well is so reduced that it becomes necessary to put in a power pump, it is a burden which he be required to assume.—*Erickson v. Crookston Waterworks, Power & Light Co.*, Minn., 117 N. W. Rep. 435.

120. **Rights to Percolating Water**.—A city can appropriate percolating water flowing under land owned by it, though to the injury of one whose spring the water would otherwise reach.—*Meeker v. City of East Orange*, N. J., 70 Atl. Rep. 360.

121. **Wills**.—Construction.—Greater latitude is allowed in the construction of wills than of deeds, and in the former, if not in conflict with some rule of law, effect is to be given to the testator's intention, to be determined from all the provisions of the instrument.—*Webbe v. Webbe*, Ill., 84 N. E. Rep. 1054.

122. **Transactions Among Devisees**.—Neither by pursuing the statutory method for partition, nor by agreement of life tenants, who were devisees under a will, can the testamentary scheme be set aside as to parties interested in the estate who were not parties to the partition or the agreement.—*Watkins v. Gilmore*, Ga., 62 S. E. Rep. 32.

123. **Witnesses**.—Cross-Examination.—Discretion to permit questions on cross-examination with reference to facts as to which the witness was not examined, in chief cannot be exercised to convert a non-expert into an expert.—*Carr v. American Locomotive Co.*, R. I., 70 Atl. Rep. 196.

124. **Work and Labor**.—Parent and Child.—The relation of father and son prevents the implication of any agreement that the latter should receive compensation for his services on the father's farm.—*More v. Luther*, Mich., 116 N. W. Rep. 986.

125. **Services of Broker**.—In an action for service as a real estate agent in procuring a tenant for defendant's hotel, plaintiff was not bound to establish an express contract, but could recover on proof of facts raising an implied promise to pay.—*Colloty v. Schuman*, N. J., 70 Atl. Rep. 190.

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IS AN AUTOMOBILE A "DANGEROUS INSTRUMENT" WITHIN THE MEANING OF THE RULE HOLDING A MASTER LIABLE FOR ITS PERMITTED PERSONAL USE BY HIS SERVANT?

It is a rule of law well settled by authority that where a master permits his servant to use for his personal gratification or profit an instrument inherently dangerous, the master will be liable for the injuries negligently effected by the servant with such instrument.

Is an automobile a "dangerous instrument" within the rule just stated as will entail a liability on the owner of an automobile for injuries negligently inflicted by his chauffeur upon third persons while said chauffeur is in sole charge of the machine and using it for his own purposes with the consent of the owner. This was the issue in the recent case of *Cunningham v. Castle*, 111 N. Y. Supp. 1057, where the court reached the following conclusion: First the master would not be liable in such a case as the servant at the time was engaged upon his own and not his master's business, unless the automobile should be considered a "dangerous instrument;" second, that an automobile does not belong in the category of dangerous articles, the mere permission to use which will involve the owner in liability for the negligence of the licensee. On this latter point the court said: "For the purposes of this discussion it must be conceded that the chauffeur was not engaged in the master's business, but was on a private pleasure trip of his own and was using therein the master's automobile with the master's knowledge and consent. It is urged that the automobile was a dangerous instrumentality, and that having been intrusted to the chauffeur, the liability of the master still attached because of its dangerous character. The automobile is not necessarily a dangerous device. It is an ordinary vehicle of pleasure and business. It is more dangerous *per*

se than a team of horses and a carriage, or a gun, or a sailboat, or a motor launch. There is no evidence that the chauffeur was not competent and qualified to run the machine. In fact, he was employed by the defendant for that very purpose. If a gamekeeper had borrowed his master's gun and had gone from the estate on a hunting expedition of his own and had negligently shot a man, would the master be responsible because he was using that instrumentality, which might be dangerous if carelessly used, the gun? I do not think that the question of the ignorance or consent of the master has any bearing whatever upon his liability. The fact that the servant has used the horses or the automobile without his consent has probative force upon the proposition as to whether or not the servant was engaged in the master's business and was acting within the scope of his employment. The question is whether he was or not. If without the knowledge of his master he took the car from the garage to a machine shop to have it fixed and an accident occurred, the fact of the want of knowledge on the master's part would not affect the liability, because the act would be within the scope of the servant's employment and in the prosecution of the master's business. If the chauffeur were granted a two-weeks' vacation and the master said to him: 'I am going off on a trip and will not need the machine; you may take it and use it for your own pleasure while I am gone,' I cannot think that he would be responsible for any negligence of the chauffeur during that period."

The dissenting opinion by Justice Houghton in the principal case contended that the character of the use to which the automobile might be put by a chauffeur was sufficient to render the owner liable for injuries to third persons where such use of his machine was with his express consent. Justice Houghton argued as follows: "While a powerful automobile may not, strictly speaking, be deemed a dangerous instrument, it may become so if recklessly driven. They are so dangerous that the legislature has prescribed that their owner-

ship must be registered, and the driver licensed, and that speed in different localities must be regulated. Motor Vehicle Law, Laws 1904, Chap. 538. The defendant recognized this when he instructed his servant to be careful on the trip which he permitted him to make. If a railroad official should loan a locomotive to one of the company's engineers for the purpose of hurriedly visiting a distant locality, it could hardly be said that the engineer alone would be liable for injuries inflicted upon third persons."

The weight of authority is with the decision of the court in the principal case that an automobile is not a dangerous instrument within the rule of law now under consideration. *McIntyre v. Orner*, 166 Ind. 57, 76 N. E. 750, 4 L. R. A. (U. S.) 1130; *Jones v. Hoge* (Wash.), 92 Pac. 433; *Lewis v. Amorous* (Ga.), 59 S. E. 338. In the last case cited the court facetiously remarked: "It is not the ferocity of automobiles that is to be feared, but the ferocity of those who drive them. Until human agency intervenes, they are usually harmless. While by reason of the pay allotted to judges in this state, few, if any, of them have ever owned one of these machines, yet some of them have occasionally ridden in them, thereby acquiring some knowledge of them; and we have, therefore, found out that there are times when these machines not only lack ferocity, but assume such an indisposition to go that it taxes the limits of human ingenuity to make them move at all. They are not to be classed with bad dogs, vicious bulls, evil-disposed mules, and the like."

NOTES OF IMPORTANT DECISIONS.

COURTS—ORIGINAL JURISDICTION OF SUPREME COURTS LIMITED TO QUESTIONS PUBLICI JURIS AFFECTING THE SOVEREIGNTY OF THE STATE OR THE GENERAL WELFARE.—The statement of the proposition of law given as the subject heading of this annotation is rapidly becoming the prevailing rule, as we said it should so become in our exhaustive annotation on the subject of the original jurisdiction of Courts of Appeal in 67 Cent. L. J. 324. The latest authority to give absolute acceptance to this

doctrine is the Supreme Court of North Dakota in the recent case of *State v. Fabrick*, 117 N. W. 860, where it was held that the sovereignty or franchises of the state, being not directly affected by proceedings for the division of a county, the Supreme Court will not interfere by mandamus to control the action of the county commissioners except under "unusual circumstances." This is the exception so often stated by Courts of Appeals to which we called attention in the annotation above referred to.

In the principal case the court declared the general rule as follows: "Merely private rights are not enough on which to base an application for the issuance of original writs by this court. The rights of the public must appear to be directly affected. The matters to be litigated must not only be publici juris, but the sovereignty of the state, or its franchises or prerogatives, or the liberties of its people must be affected. Before the court will, in the exercise of its original jurisdiction issue prerogative writs, there must be presented matters of such strictly public concern as involve the sovereign rights of the state, or its franchises or privileges. The often quoted statement of the rule as to the original jurisdiction of the Supreme Court to issue writs of a prerogative character, as given in *Attorney General v. City of Eau Claire*, 37 Wis. 400, is well expressed and clear: "To warrant the assertion of original jurisdiction here the interest of the state should be primary and proximate, not indirect or remote; peculiar, perhaps, to some subdivision of the state but affecting the state at large in some of its prerogatives; raising a contingency requiring the interposition of this court to preserve the prerogatives and franchises of the state in its sovereign character."

The principal case, however, was held to be one of the "exceptional" cases which do not come within the rule for the reason that unless the issue as to the proper submission of the question to be voted for at the 1908 election were determined on, this original hearing, the right to vote would be utterly lost for at least two years because of the necessary delays incident to the bringing of a suit through the ordinary channels of procedure. The court said on this point: "The matter of the division of a county is one of public importance to the people of the county. The statute gives the people a right to express a choice on that question. Inasmuch as the question must be voted on at the next succeeding election after the presentation of the petition to the commissioners, it is not improbable that delays or refusals by some official will cause the same situation in 1910 as now confronts

the petitioners. We are fully convinced that only matters of the gravest importance should be considered sufficient to warrant this court in issuing prerogative writs at the request of private relators. Nevertheless we deem the circumstances and conditions surrounding this case to show such a state of facts as to bring it within the exception to the general rule. By refusing to entertain the writ now, it is inevitable that a delay of two years will be occasioned. A delay for so long a period on a matter of this importance is a potent consideration in favor of taking jurisdiction. In view of the fact that an appeal to the Supreme Court can follow any decision of the district court in the case, we think the interests of justice demand that this court should act and dispose of the controversy now, and prevent further delay on a matter of such great consequence to the people of Ward county."

CONSTRUCTIVE CRIMES DEFINED.

The constitutional requirement of "due process of law," of course presupposes a "law" without which a conviction for crime could not be constitutional. In many ways and places I have endeavored to resurrect and revivify the old maxim, "Ubi jus incertum ibi jus nullum"—(where the law is uncertain there is no law). I have done this to the end that this maxim may be judicially declared to be a part of our constitutional conception of "law," as that word is used in the constitutional guarantee that no man shall be deprived of life, liberty or property, except by "due process of law."

In the essays just referred to in the note I justified with considerable elaboration the proposition that in the United States no man can be punished for mere constructive offenses. I have gone further and have attempted to formulate a statement of the

nature of law as viewed in the scientific aspect, in contradistinction to that arbitrary power which punishes constructive offenses, and I have undertaken to make a comprehensive discussion as to what is a constructive offense in relation to "due process of law." Here I will only undertake to summarize those conclusions, already justified in various ways.

Constructive Crimes Classified.—Constructive offenses naturally divide into two general classes. In the first of these the more direct responsibility for the prohibited constructions rests with the courts, and arises from the judicial engraftments made upon legislative enactments, and the second class includes those where the more direct responsibility for the evil primarily rests with the legislature for having attempted to construct a wrong, by penalizing conduct not in itself injurious, nor of injurious tendencies according to any known laws of the physical universe. These two general classes of constructive crime readily lend themselves to a further subdivision, according to the various conditions which conduce to such baneful punishments for mere constructive wrongs. These different sources of such error will now be pointed out with a little more system and elaboration, and it is believed that the following statements are justified by, and generalize all, that is included in the discussion and the authorities cited in the several articles above referred to. In what follows it will be necessary for the clarifying of our vision to subdivide still further the two general classes of constructive offenses, above referred to.

Judicial Legislation Under Pretense of Interpretation.—The first class of constructive offenses is best understood. Here the act under investigation is one which under any of the tests prescribed hereafter, may properly be penalized, but it is not within the plain letter of the prohibitive statute because the statutory tests of criminality, though certain in meaning and covering acts of the same general character, manifestly do not specifically include the con-

(1) For my discussions thereof see: "The Scientific Aspect of 'Due Process of Law,'" *Am. Law Review*, June 1908. "Concerning Uncertainty and 'Due Process of Law,'" *Cent. Law Jour.*, Jan. 3, 1908. "The Historical Interpretation of 'Law,'" *The Albany Law Jour.*, April, 1908. "Due Process of Law in Relation to Statutory Uncertainty and 'Constructive Offenses,'" N. Y. 1908, Pub. by The Free Speech League, 120 Lexington ave., N. Y. (This last booklet contains the three foregoing essays, and much more similar matter besides.)

duct under investigation. In such a case the judicial enlargement of the field plainly marked out by the statute is so universally recognized as improper, because judicial legislation, and therefore within the prohibited constructive offenses, as to need no argumentative support. Indeed, all our judicial rules for the strict construction of criminal statutes are founded upon the necessity of precluding judges from creating law.

The second class of constructive offenses is less perfectly understood. Here the act under investigation is again one which, under any of the tests prescribed hereafter, may properly be penalized, but the statutory language is ambiguous in its specification of the criteria of guilt. Such statutes, often seduce judges into an abuse of their power by a misapplication of rules of construction. Where the words descriptive of the crime are ambiguous, (open to several interpretations, some or all of which meanings, taken separately, are very certain in their application to all specific facts), it is erroneously assumed by many courts that it is an exercise of the judicial function of statutory interpretation to select that one among all the possible meanings of the statute which is to be enforced. I do not conceive it so. The judicially selected interpretation may not be the one which the legislature intended to enact. Certainly it has not received the specific sanction of the legislative branch of the government, any more than every other possible interpretation, and the only conduct which can with certainty be known to be within the legislative prohibition (that is, within *the law*) is those acts which are clearly within every possible meaning of the statute. If this rule has not been always observed in the matter of ambiguous statutes, it is because judges have not seen clearly the true relation between such ambiguity and *the law*, as a scientist must view it, nor the distinction between judicial legislation and judicial interpretation.

The third class of these prohibited con-

structive offenses is those where definitive description of the crime is wholly wanting (uncertainty as distinguished from mere ambiguity) because there is total absence of any certain, clear, universal and decisive tests of criminality. Then we have a case for the application of the old maxim: "Where the law is uncertain there is no law." In such a case if the court should supply the tests of criminality, so indispensable to the enforcement of every statute, those tests would not have the sanction of the legislative branch of the government, and therefore could not be *the law*, in any criminal case. Supplying these tests, or criteria of guilt, is therefore clearly a matter of judicial legislation, by means of statutory interpolation, as distinguished from interpretation, and punishment thereunder is punishment for a constructive offense, and not due process of law.

If in a criminal case a court should undertake to enforce upon any person a judgment which did not conform to general, uniform and certain rules of conduct having an exact, verbally-formulated existence, which is wholly created by the legislative department, and therefore existing outside the mere will of the court, and well known or easily accessible to all prior to the inception of the cause of action then before the court—I say, if a court should undertake to enforce anything different from such a law, it would not be enforcing *the law* at all, and to submit to such penalties would be submission to a government by the arbitrary and despotic will of the judiciary, and not in any sense would this be a government according to *law*, and this must always be the case where the statutory criteria of guilt are uncertain. Criminal punishment under such circumstances would be punishment for constructive crimes, and not due process of law.

Legislative Penalizing of Mere Constructive Injuries.—Fourth: It follows from the fact that human justice and a secular state, can only deal with material factors, that an offense to be real, and not merely construc-

tive, must be conditioned upon a demonstrable and ascertained material injury, or upon the imminent danger of such, the existence of which danger is determined by the known laws of the physical universe. Our constitution, both in its guarantee of freedom of speech and press, and in its guarantee of due process of law (as we must understand *the law*, according to the scientific view-point), precludes the construction of mere psychologic crimes. The offenses which are based only upon ideas expressed or otherwise, such as constructive treason, witchcraft, and heresy, either religious or ethical, and all kindred psychologic or other constructive crimes, are prohibited, because the very nature of *the law* whose supremacy and processes our constitution guarantees, is such that American legislators cannot be permitted to predicate crime upon mere psychologic factors. Manifestly this does not preclude punishment when these psychologic factors have ceased to be merely such, by having resulted in actual material injury as distinguished from constructive and speculative injury; for example, it does not preclude punishment in cases of personal libel, which has resulted in material injury or where the uttered opinion has resulted in actual crime. Under such circumstances as to make one an accessory before the fact, or as to prove a conspiracy to secure its commission.

Furthermore, if the state should be permitted to penalize an act which is not an essential element in doing violence to that natural justice which can deal only with material and physical factors, such a statute could not be one enacted in the furtherance of the governmental purpose to establish justice (material justice) and therefore such a law could not be within the legitimate province of such a government as we profess to maintain. Furthermore, such a statute, penalizing an act which is not an essential element in violating natural justice, must in itself be the creation of an injustice—that is, it must in itself and from its very nature, authorize an invasion of liberty, unwarranted by any ne-

cessity for defending natural justice, or maintaining the greatest liberty consistent with equality of liberty, and therefore the enforcement of such a statute would be the deprivation of liberty without due process of *law*, as we must understand “law” if we view it in the scientific sense. I conclude that every such statute as I have last hereinabove described is also an attempt to punish for a constructive offense—is a violation of our constitutional guarantee of due process of law.

Difficulty in the Application.—It hardly seems possible that there could be much conflict of opinion about the foregoing generalities. The differences of opinion I apprehend will arise chiefly when we come to make deductions therefrom for application to some particular statute, and the result comes in conflict with our moral sentimentalism. Under such circumstances we are all predisposed to error, because our emotions will necessarily blur our intellectual insight as to the difference between certainty in the very words of the statute, and a strong feeling certitude within us that the legislature must have means to prohibit exactly what *we feel* that they ought to have prohibited. Thus moved by our feelings, just to the extent that they are intense, we will be certain to read our feeling-convictions into the statutes, which often by reason of their very uncertainty, readily lend themselves to this dangerous and almost inevitable evil, of judicial penal-legislation. If this evil can be avoided it will only be because our intellectual development is of that superior order which dominates the feelings, without ever being overcome by them, and which at the same time enables us to possess an illuminated view of the point of contact and division between judicial (so-called) statutory construction, and a judicial usurpation of the legislative function, under the guise of statutory interpretation. These considerations seem to make it desirable that the foregoing principles be more elaborately restated with some special attention to the factors which necessarily imply unconstitu-

tional uncertainty and form the tests by which statutes will be adjudged to be uncertain, and consequently a nullity. Thus we will still further clarify our intellect and fortify ourselves against the dangerous, liberty-destroying tendency to punish for constructive offenses.

Penalizing Abstractions and Emotions.—If the legislative verbiage in a criminal enactment is so involved as to make its significance doubtful, or if the offense is bunglingly described by words which symbolize and generalize only a subjective (emotional) state, associated in the minds of different persons with a variety of mere, peculiarly personal, abstractions incapable of accurate, concrete definition, such as is uniformly applicable to every conceivable case, and decisive beyond all speculative doubt, then in either event, that enactment must be declared a nullity, because "where the law is uncertain there is no law." If courts were allowed to decide which of possible or conflicting descriptions is to be made effective and which annulled, or are allowed to create the criteria of guilt, when the legislature has failed to do so, this would be judicial legislation, because the legislature having furnished no exact material for definition, the courts can only declare that to be the law which its judges, in the exercise of legislative discretion, believe ought to be the law, (instead of deriving that legislative intent exclusively by deductions made from the legislative language); and therefore read it into the statutes and dogmatically declare the judge's will to have been the legislative intent.

The judicial power over criminal statutes must be limited to a mere redeclaration, or restatement of that which, to every intelligent person, is already definitely and clearly manifest from the actual words of the enactment, and from these alone. If it requires more than this to make the statute enforceable, or applicable to a particular case, then the statute is a nullity under the maxim: "Where the law is uncertain there is no law." To do less than this, for every word used in the enactment, or to do more

by importing and engrafting into a criminal statute facts and phrases not actually placed there by the legislative body, is again a judicial usurpation of the power to enact criminal legislation.

It follows that if those words, which alone are actually employed in the statute, do not unavoidably import such an exact definition, that every man of average intelligence, *by the use of the statutory definition alone* can determine with mathematical certainty, whether a particular act is a crime, (or a particular book is obscene) then the legislative body has failed to create a criminal "law," and the court being without legislative power, has nothing to execute, but must declare the pretended statute a nullity, because, "where the law is uncertain there is no law."

Statutory Words Must Symbolize Definite and Uniform Concepts.—Not quite identical with the foregoing proposition is this truism: The power of courts is limited to deductions made from the legislative words; that is, the general concept symbolized by the statutory words may be made concrete to determine if the specific act is necessarily included in the legislative general conception, as that is exclusively revealed in the legislative language: In other words, the court cannot create such a concept where the legislative word-symbols do not stand for definite concepts. That again would be judicial legislation, not interpretation, because, "where the law is uncertain there is no law," and a law which requires this to make it effective is void.

If courts can be credited with any power to construe penal statutes, the ambiguity which furnishes the occasion and subject-matter of construction, must be found solely in the word-symbols used in the criminal statutes, and not in the exercise of judicial legislative-power, under the guise of interpreting the indefinable nature of that which the legislative words in fact do symbolize. Any other rule would authorize arbitrary *ex post facto* judicial legislation and punishment, and where the legislative word-symbols do not stand for definite concepts,

the enactment is a nullity because "where the law is uncertain there is no law."

To clarify our minds let this be restated in another way. When the word-symbols descriptive of the crime do not stand for definite or concrete concepts, nor any sense-perceived, objective quality or activity of matter, of present or past existence, but represents to each individual, only a subjective relation between his own purely personal experience, or the abstractions made from them, and his purely personal emotions of approval or disapproval, then the words used to describe this subjective condition, because of its abstractions and emotional element, always making it personal and individual, must always elude accuracy of definition, and the law is void "because where the law is uncertain there is no law."

Whenever we neglect the requirement that every crime must be predicated upon some actual sense-perceivable and proven material injury, or the imminent danger of such determined to be imminent by the known laws of the physical universe, and therefore accurately definable and so defined in the statute; I say, whenever we abandon these requirements then we are condemning men on mere metaphysical speculations about unrealized psychologic tendencies, or according to the personal ethical sentimentalizing, whim, caprice, malice, etc., etc., on the part of those charged with the execution of the law, and thus the judge arrogates to himself the role of legislator, and under such enactments convictions are never secured according to the uniform express authority of any statute, and all such convictions inflict punishment, for mere constructive injuries, and are an unconstitutional deprivation of liberty and property because not "due process of law." This error, I repeat, is one easily made if we are but careless about the proper different attitudes of mind which should characterize our outlook upon penal statutes and those of a civil nature which only declare and enforce natural justice; or if our vision is clouded as to the difference be-

tween deductions made from the statutory phrases and our feeling-convictions, read into statutes, made hospitable thereto because uncertain, and therefore containing little or no limitation upon the reading-in process.

Under our system (especially that of the Federal Criminal law,) where legislative power is definitely placed, accurately limited, and incapable of transference to a jury, star-chamber, or any other department of government, and where in addition *ex post facto* laws are prohibited, it is manifest that the maxim against uncertainty in statutes must be treated as an inseparable, inalienable and inherent part of that liberty of the citizens which is guaranteed by every American constitution. Without certainty before the fact, as to what is the law in relation to it, there can be no such thing as "due process of law" in any conviction. If the criminal statute is uncertain, then courts and juries become legislators after the fact, if any enforcement of the statute is had.

It follows that if any American legislative body should create a crime without defining it, such enactment would be a nullity. Should an attempt be made to penalize the commission of "screw-loos-ibus," without defining the word, such a law would be unenforceable and void. It is intolerable that courts should resort to current history, and therefrom deduce meaning to be read into a penal statute whose words are devoid of all definiteness of meaning. By such a process the court might conclude that a legislature by "screw-loos-ibus" intended to penalize certain unpopular practices of christian scientists. If courts may thus speculate inductively from current history, personal emotions and prejudices, and read the result into penal statutes by dogmatically asserting that this or that was the legislative intent, then we have re-established judicial despotism. In the absence of a generally known and *accurately definable* meaning for the word, an enforcement of the law against "screw-loos-ibus" would necessarily involve the exercise of legislative power, by the court or

jury charged with its execution, and this enactment, by an unauthorized delegation of legislative power, must be specially made at each trial to cover only the acts then under investigation, and must always *be ex post facto*. For each of these reasons a law which in its practical administration necessarily involves such objections must be judicially annulled.

If a criminal law is so vague as to need interpretation, then it should be declared a nullity for uncertainty. Any other course necessarily involves on the part of the interpreting judge that as between all possible meanings he exercise his own legislative discretion and read the result into the legislative intent and phraseology. If the words, to be interpreted symbolize emotions as their only element of unification, and therefore are incapable of accurate general definition, or if the materials for a judgment as to the applicability of the law to every conceivable case, are varying in different persons, then to allow judges or juries to interpret or apply such a doubtful statute is to admit their authority to enforce an *ex post facto* criteria of guilt; which is not public nor general, but of private origin in the court, and particular for each defendant.

These foregoing speculations suggest all that has occurred to me by way of specifying in general terms the principal sources of that outrageous remnant of absolutism, which so often results, even in our time and country, in the damnable practice of punishing men for mere constructive offenses. The motive for these wrongs is usually a stupid moral sentimentalism and self-righteousness, and often finding its roots in religious superstitions of the past. The remedy can only be found in securing judges whose intellectual development is such as to make them true scientists of the law, and who with clear intellectual insight shall combine that moral courage which will make them dare to resist the "moral" rant of a politically potent but intellectually bankrupt professional reformers. I am sure there are such judges, and that with

persistence and diligence they can be found.

The Standard of Certainty.—The standard of certainty and constitutionality is that a criminal statute to constitute "due process of law," must define the crime in terms so plain, and simple, as to be within the comprehension of the ordinary citizen, and so exact in meaning as to leave in him no reasonable doubt as to what is prohibited. Those qualities of generality, uniformity, and certainty, must arise as an unavoidable necessity out of the very letter of the definition framed by the law-enacting power, and not come as an incidental result, from an accidental uniformity in the exercise, by courts, of an unconstitutionally delegated legislative discretion. If a statute defining a crime is not self-explanatory, but needs interpretation, or the interpolation of words or tests to insure certainty of meaning in the criteria of guilt, then it is not *the law* of the land, because no such judicial test of criminality has ever received the necessary sanction of the three separate branches of legislative power, whose members alone are authorized and sworn to define crimes and ordain their punishment. Laws defining crimes are required to be made by the law-making branch of government because of the necessity for limiting and destroying arbitrariness and judicial discretion in such matters. That is what we mean when we say ours is a government by *laws*, and not by men. It follows that it is not enough that uniformity and certainty shall come as the product of judicial discretion, since "law" is necessary for the very purpose of destroying such discretion in determining what is punishable.

An Illustrative Application.—Let us briefly apply the foregoing test of constitutionality to our various laws against "obscene indecent, filthy or disgusting" literature or art. To constitute a valid criminal law the statute under consideration must so precisely define the distinguishing characteristics of the prohibited degree of "obscenity" that guilt may be accurately

and without doubt ascertained by taking the statutory description of the penalized qualities and solely by the tests of obscenity therein prescribed determine the existence of the prescribed criminal qualities in the physical attributes inherent in the printed page. Judicial tests of "obscenity" cannot be read into the statutory words. Nor can official or judicial speculations (of a character not calculated to discover such definitely penalized physical qualities in the book) be permitted, so long as they deal only with the mere unrealized psychologic potentiality, for influencing in the future some mere hypothetical person. Such speculative psychologic tendencies are never found with certainty in any book, but are read into it, with all the uncertainty of the *a priori* method, as an excuse for a verdict of guilty. Even if the legislative body attempted to authorize such a procedure it would be a nullity, under the maxim, "Where the law is uncertain there is no law." Therefore such procedure cannot be "due process of law." An unrealized psychologic tendency cannot be made the differential test of criminality, although for the sake of the argument we admitted that such tendency may properly appeal to the legislative discretion, and may properly result in penal laws wherein the statutes and not the courts, specify the tests, definite and certain, by which to determine what it is that is deemed to possess the criminal degree of such dangerous tendency.

It is for the legislature definitely and precisely to prescribe all the criteria of guilt by which to determine the existence of that which is prohibited, because of its immoral tendency, and no mere seeming necessity nor even by express language, and much less by vague implication derived from mere uncertainty, can it delegate to the judge or jury a legislative discretion for condemning, after the facts, according to its own arbitrary guess about the problematical psychological influence and a consequent immoral tendency of a book. For the foregoing reason all laws against "ob-

scene, indecent, filthy or disgusting" literature or art" are void, as not constituting "due process of law."

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RAILROADS—SAFETY APPLIANCE ACT—CONSTRUCTION OF.

UNITED STATES v. ATCHISON, TOPEKA & SANTA FE RAILWAY CO.

United States Circuit Court of Appeals, Eighth Circuit, August 22, 1908.

The safety appliance law of Congress, in the situations in which it is applicable, imposes upon a railway company an absolute duty to maintain the prescribed coupling appliances in operative condition, and is not satisfied by the exercise of reasonable care to that end.

VAN DEVANTER, Circuit Judge. This writ of error challenges a judgment for the defendant in a civil action to recover a penalty for an alleged violation of the safety appliance law of Congress embodied in Act March 2, 1893, c. 196, 27 Stat. 531 (U. S. Comp. St. 1901, p. 3174), Act April 1, 1896, c. 87, 29 Stat. 85; and Act March 2, 1903, c. 976, 32 Stat. 943 (U. S. Comp. St. Supp. 1907, p. 885). Stripped of matters about which there is no controversy here, the violation charged consisted in hauling a car, in the usual course of transportation, when one of the couplers thereon was broken and inoperative, so that it could not be coupled or uncoupled without the necessity of a man going between the ends of the cars. The trial was to a jury, and the single question presented to us is whether or not the duty of the defendant, in respect of the maintenance of the coupler in an operative condition, was correctly stated in the portion of the court's charge, which reads: "The act, however, must necessarily have a reasonable construction. These couplings will get out of repair, and it takes time to repair them. It takes time to discover whether or not they are out of repair. It is the duty of the railway companies to use prudence and the ordinary diligence of a business man, keeping in view the purposes of the act, to keep these couplings in repair. * * * And it is for you to determine in this case whether or not the defendant used reasonable care in ascertaining whether the car was in good repair, and then, again, whether the defendant used reasonable care in putting the coupler in good repair, after it ascertained that it was out of repair. If you find that it did use reasonable care in both instances, then it is not liable, and you should return a verdict in favor of the defendant; otherwise, you should find for the United States."

Applying to the evidence the law as so interpreted, the jury returned a verdict for the defendant, which the court declined to disturb upon a motion for a new trial. *United States v. Atchison, etc., Ry.*, (D. C.), 150 Fed. 442. That the interpretation of this law of Congress has been attended with difficulty is attested by many varying opinions in the reported cases, and that there are considerations tending to sustain the construction placed upon it by the District Court is attested by the opinion rendered upon the motion for a new trial and by the sustaining opinions in other cases, notably *St. Louis & S. F. Ry. Co. v. Delk* (C. C. A.) 158 Fed. 931; but, as we read the opinion of the Supreme Court in the more recent case of *St. Louis, Iron Mountain & Southern Ry. Co. v. Taylor*, 210 U. S. 281, 28 Sup. Ct. 616, 52 L. Ed. —, s. c. 71 Ark. 445, 78 S. W. 220; 83 Ark. 591, 98 S. W. 959; it is now authoritatively settled that the duty of the railway company in situations where the congressional law is applicable is not that of exercising reasonable care in maintaining the prescribed safety appliance in operative condition, but is absolute. In that case the common-law rules in respect of the exercise of reasonable care by the master and of the non-liability of the master for the negligence of a fellow servant were invoked by the railway company, and were held by the court to be superseded by the statute; it being said in that connection (page 294 of 210 U. S., page 620 of 28 Sup. Ct. 152 L. Ed.,—): "In deciding the questions thus raised, upon which the courts have differed (*St. Louis & S. F. Ry. v. Delk* [C. C. A.] 158 Fed. 931), we need not enter into the wilderness of cases upon the common-law duty of the employer to use reasonable care to furnish his employees reasonably safe tools, machinery, and appliances, or consider when or how far that duty may be performed by delegating it to suitable persons for whose default the employer is not responsible. In the case before us the liability of the defendant does not grow out of the common-law duty of master to servant. The Congress, not satisfied with the common law duty and its resulting liability, has prescribed and defined the duty by statute. We have nothing to do but to ascertain and declare the meaning of a few simple words in which the duty is prescribed. It is enacted that 'no cars, either loaded or unloaded, shall be used in interstate traffic which do not comply with the standard.' There is no escape from the meaning of these words. Explanation cannot clarify them, and ought not to be employed to confuse them or lessen their significance. The obvious purpose of the Legislature was to supplant the qualified duty of the common law with an absolute duty deemed by it more just."

While the defective appliance in that case was a drawbar, and not a coupler, and the action was one to recover damages for the death of an employee, and not a penalty, we perceive nothing in these differences which distinguishes that case from this. As respects the nature of the duty placed upon the railway company, section 5, relating to drawbars, is the same as section 2, relating to couplers, and section 6, relating to the penalty, is expressed in terms which embrace every violation of any provision of the preceding sections. Indeed, a survey of the entire statute leaves no room to doubt that all violations thereof are put in the same category, and that whatever properly would be deemed a violation in an action to recover for personal injuries is to be deemed equally a violation in an action to recover a penalty.

Because, in view of the later decision in the Taylor Case, the instruction before quoted did not embody a correct statement of the law, the judgment is reversed with a direction to grant a new trial.

NOTE.—Extent of Railroad's Liability for Failure to Comply with Provisions of the Federal Safety Appliance Act.—Many difficult questions have arisen concerning the proper construction of what is known as the safety appliance act, requiring railroads to equip all their rolling stock with automatic couplers and continuous brakes.

Liberal Versus Strict Construction.—While this statute is penal and in derogation of the common law, it is not to be construed so strictly as to defeat the obvious intention of Congress as found in the language actually used according to its true and obvious meaning. *Johnson v. Southern Pacific Co.*, 196 U. S. 1. Or in other words, a statute such as this, is to be construed so as to prevent the mischief and advance the remedy so far as the words fairly permit. *Chicago, etc., R. R. v. Voelker*, 129 Fed. 522.

But in the case of *United States v. Illinois Central R. R.*, 156 Fed. 182, the court held that the safety appliance act was a criminal statute and is to be construed as such and in suits by the government to inflict the penalty thereunder the offense must be proven beyond a reasonable doubt. It would seem, however, that in view of a recent decision of the supreme court (*Taylor Case*, 210 U. S. 281), this holding is erroneous.

The Question of Interstate Commerce.—What cars are engaged in interstate commerce, making necessary the equipment required by statute? The Supreme Court of the United States has held that a dining-car regularly engaged in interstate traffic does not cease to be so when waiting for the train to make the next trip. The argument here is that an "empty" or "idle" car standing in some "local" yard is not to be measured as to its interstate character by the same standards as determine the interstate commerce character of ordinary merchandise (116 U. S. 517), but a presumption of the interstate character of cars used by interstate carriers follows cars "used in moving interstate commerce, which have stopped temporarily in making its trip between two points in different

states." *Johnson v. Southern Pacific Co.*, 196 U. S. 1. See also *Voelker v. Railway Co.*, 116 Fed. 867, 70 L. R. A. 264, where the language of Justice Shiras in arguing that "empty" cars are within the meaning of the statute is specially quoted with approval by the supreme court in the *Johnson* case.

Where a car loaded with lumber and shipped from another state had not been delivered to the consignee at the time it was stopped in a railroad yard at destination and placed on a sidetrack for repairs to the automatic coupler, the stoppage in the yard was an incident to the transportation, so that the car was still engaged in interstate commerce within the meaning of the safety appliance act. *St. Louis & San Francisco R. R. Co. v. Delk*, 158 Fed. 931.

So also it has been held that the provision of the safety appliance act applies to a car designed for interstate traffic, though at the time being hauled "empty." *Voelker v. Railroad Co.*, 116 Fed. 867. See also *U. S. v. Ill. Cent. Ry. Co.*, 156 Fed. 182; *U. S. v. Railroad*, 162 Fed. 185. It is also held that a car destined for a distant point in another state is still in interstate commerce though transit may be temporarily suspended. *Chicago, etc., R. R. v. Walker*, 129 Fed. 522.

What are "Cars" Within the Meaning of the Act?—It has been held that locomotive engines are included by the words "any car" contained in the second section of the act. *Johnson v. Southern Pacific Co.*, 196 U. S. 1. The argument there is that although locomotives are also required by the first section of the act to be equipped with power driving wheel brakes, the rule that the expression of one thing excludes others does not apply, inasmuch as there was a special reason for that requirement and in addition the same necessity for automatic couplers existed as to them as in respect to other cars.

Style and Character of Couplings Used.—It has been held that the equipment of cars with automatic couplers which will not automatically couple with each other so as to render it unnecessary for men to go between the cars to couple and uncouple is not a compliance with the law. *Johnson v. Southern Pacific Co.*, 196 U. S. 1. See also: *U. S. v. L. & N. Railroad*, 162 Fed. 185. And it has also been held that this test, to-wit, whether the person operating the coupler is required to go between the ends of the cars, applies to the act of coupling as well as that of uncoupling. *Chicago, Milwaukee & St. Paul R. R. Co. v. Voelker*, 129 Fed. 522. In this last case the coupler had become so defective that the lever would not lift the pin from the socket and the knuckle could not be drawn open by leaning toward the coupler and using one hand, but required the presence of the operator's entire body between the ends of the cars.

It had also been held that under the act of 1893, requiring draw-bars, when cars are empty, to be 34½ inches above the rails, with a maximum variation, loaded or unloaded, in the height downwards of 3 inches, does not require that the variation shall be proportioned to the loads or that a fully loaded car shall exhaust the entire variation. *St. Louis, etc., R. R. v. Taylor*, 210 U. S. 281.

It has been held that each car is to be considered separately and shall each be equipped with automatic couplers in operative condition at both ends. *U. S. v. Philadelphia, etc., R. R.*, 160 Fed. 696.

Subsequent Care, Repair and Operation, of Couplings.—Some difference of opinion exists on this phase of the question. It has been held that while the safety appliance act imposes on the carrier the absolute duty of equipping its cars with automatic couplers in the first instance, and thereafter keep them so equipped, the carrier is only required to use reasonable care, after the cars have been so equipped, to keep such couplers in repair. *St. Louis & San Francisco R. R. Co. v. Delk*, 158 Fed. 931. To same effect: *Missouri, etc., R. R. v. Brinkmeier (Kans.)*, 93 Pac. 621.

But it has also been held that this duty is an absolute one and that it is not a defense that defendant exercised reasonable care and diligence to keep the coupling apparatus on its cars in repair. *United States v. Southern Railway Co.*, 135 Fed. 122. It was further held in this case that, placing an "M. C. B." defect card upon a car, and noting on such car defects forbidden by the safety appliance act which is notice to all connecting lines that the defendant sent the car out defective, and that other lines using the car would not have to account to defendant for the defects noted is a deliberate violation of the statute and a defiance of the law.

The case of *United States v. Atchison, Topeka & Santa Fe Ry. Co.*, 150 Fed. 442, takes the opposite position, holds that this act being penal should not be strictly construed against the defendant and that a mere failure of defendant railroad company's inspectors on first inspecting the car before delivering it to a connecting carrier to discover that the chain attached to the lever by which the automatic coupler was broken, the same having been discovered and repaired on a subsequent inspection before delivery to the connecting carrier, did not constitute a violation of the act.

It is well to distinguish the last two cases, where the United States sues to recover the penalty provided for failure to keep couplers on cars used in interstate traffic in repair, and cases like the *Voelker* case, which is a suit for personal injuries occasioned by the use of such defective couplers. In the first case no one is injured and the courts seem inclined not to impose the duty in such a case as an absolute one, while in the second class of cases the fact that the cause of the injury was the defective coupler is sufficient to hold the defendant liable.

The rule is otherwise stated as follows: Where an automatic coupler is out of repair for a length of time reasonably sufficient to have it repaired, the railroad is absolutely liable for all injuries which may occur. *Elmore v. Railroad*, 130 N. Car. 506. Otherwise, not. *United States v. Ill. Cent. Ry. Co.*, 156 Fed. 182.

It would seem, however, that this question has been settled by the supreme court in the recent case of *St. Louis, etc., R. R. v. Taylor*, 210 U. S. 281, 28 Sup. Ct. 616, where it was distinctly held that the safety appliance act supplants the common law rule of reasonable care on the part of the employer as to providing the appliances defined and specified therein, and imposes on interstate carriers an absolute duty, under which duty the defense of reasonable care is unavailable. See also to same effect: *U. S. v. Railroad*, 162 Fed. 405.

Where cars become defective while moving interstate traffic, the railroad must use reasonable diligence to discover the defects and repair same

at once or at the nearest point where it can be done. *U. S. v. Great Western Ry. Co.*, 162 Fed. 1052. It has been held that where there has been a "rest" for one hour, the railroad is negligent in again moving the car without repairing coupler. *United States v. Philadelphia, etc., R. R.*, 160 Fed. 696.

In regard to the operation of proper couplings it has been held that the safety appliance act cannot be construed so as to require that the equipment shall in fact be efficiently operated by those in charge of the train.

Proximate Cause, Assumption of Risk and Other Defenses.—It has been held that the failure to equip a car with a coupler, coupling automatically, by reason of which a car coupler was obliged to go between the cars, is a proximate cause of the accident, though the cars were forced together by the negligent kicking of other cars against them. *Voelker v. Railroad*, 116 Fed. 867.

On the question of assumption of risk it is to be noted that the act itself (sec. 8), specially provides that one injured by a defective coupler shall not be deemed to have assumed the risk though he continue in the employment of the railroad company after knowledge of the use of such defective couplers. Under this section it has been held that a switchman engaged in handling a freight car having a defective coupler, on a track principally used for handling freight trains, though sometimes used to handle cars in need of repairs, did not assume the risk arising from the defect in the coupler; the car not having been marked or isolated as one in bad repair, and its movement at the time not being with a view to its isolation or repair. *Chicago, etc., R. R. v. Voelker*, 129 Fed. 522.

In regard to the defense of contributory negligence, it is to be observed that the failure to equip or keep in repair automatic couplers on all rolling stock amounts to a continuing negligence on the part of the railroad company and that therefore there can be no contributory negligence which will discharge its liability to an employee injured while coupling such defective cars. *Elmore v. Railroad*, 130 N. Car. 506.

ject. The late Mr. Justice Pinney wrote the decision for the court, which was unanimous.

Very truly yours,

DUANE MOWRY.

Milwaukee, Wis.

JETSAM AND FLOTSAM.

WHERE THE CAUSE OF ACTION RETURNS TO LIFE.

Through the courtesy of one of our esteemed correspondents, we publish below a motion to dismiss a suit on an insurance policy filed November 17, 1908, in the District Court of Wapello County, Iowa, to-wit:

Comes now Smith & Lewis, attorneys for plaintiff, and shows to the court that this is an action upon a life insurance policy based upon the belief that the assured, Andrew Olson, was dead. As shown in the petition he had disappeared from Ottumwa some thirteen years ago, and for the past eight or ten years he has not been heard from and his whereabouts unknown; diligent search had been made for him without results, and so plaintiff concluded that he had passed to that bourne whence no traveler returns. She caused letters of administration to issue upon his estate as dead and brought this action, but the said Andrew Olson is not dead at all, though this court has solemnly recorded that he was dead. In short, the said Andrew has returned from the said bourne and is here on earth in the flesh, and so far as we can see he is likely to continue in this vale of tears for many moons to come. Under these circumstances it would be hard for us to convince a jury that the plaintiff should recover. In fact, she does not want to recover. To confess, she is the first client that we have ever had to sincerely rejoice at defeat. And now we ask leave of court to dismiss this case without prejudice to our rights to reinstate at some future time, should that time ever come when we are cock sure that Andy is dead.

SMITH & LEWIS.

CORRESPONDENCE.

SUPERIOR RIGHT OF PARENT TO CUSTODY OF MINOR CHILD.

Editor of the Central Law Journal:

Apropos of your editorial on the "Superior Right of a Parent to the Custody of a Minor Child" found in your issue of the 11th instant, let me refer your readers to an interesting and comprehensive discussion of the whole subject by the Supreme Court of Wisconsin, reported in the case of *Markwell v. Pereles* and found in the 95 Wis. 406. In that case it appeared that the father was of apparent ample financial ability to support his child. And the fact that the father was of a cold and unsympathetic nature could not, in the mind of the court, operate to deny him the custody of his child.

The relation of parent and child with particular reference to the custody of the child, is treated exhaustively. So much so that the case must be regarded as a leading one on the sub-

HUMOR OF THE LAW.

Judge—Mr. State's Attorney, before you can introduce this witness you must show the loss of the record.

State's Attorney—I presume your honor was aware of the fact that the records of Marion County were burned.

Judge—As a private citizen I do know the fact, but as the court I do not, and you must put the proof of the fact into your case.

State's Attorney—Well, your honor, it strikes me a little singular that your honor knows something off the bench, and don't know anything on it.

"What are they moving the church for?"

"Well, stranger, I'm mayor of these diggin's, an' I'm fer law enforcement. We've got an ordinance what says no saloon shall be nearer than three hundred feet from a church. I give 'em three days to move the church."

WEEKLY DIGEST.

Weekly Digest of ALL Current Opinions of ALL the State and Territorial Courts of Last Resort, and of all the Federal Courts.

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1. **Appeal and Error—Excessive Damages.**—Where the damages for personal injuries are excessive, the court may reverse unless plaintiff will stipulate to reduce the verdict.—*Weinert v. Merchants' & Shippers' Warehouse Co.*, 112 N. Y. Supp. 123.

2. **Hypothetical Questions.**—Exclusion of hypothetical questions to expert witness held to be presumed to be prejudicial error, where both parties below assumed that the answer would be favorable to the party asking the question.—*Ross v. Schrieves*, Mass., 85 N. E. Rep. 468.

3. **Offer of Proof.**—Error cannot be predicated on the refusal of the court to permit witnesses to answer as to particular matter, where no offer was made to show what the witnesses would answer.—*St. Louis Southwestern Ry. Co. v. Myzell*, Ark., 112 S. W. Rep. 203.

4. **Suspensive Appeal.**—Where a suspensive appeal is allowed from a judgment for money, and it is dismissed for failure to furnish bond, no appeal from the judgment of dismissal can suspend the execution of the judgment originally appealed from.—*Reynolds v. Egan*, La., 47 So. Rep. 371.

5. **Verdicts.**—Where the trial court approves the amount of a verdict, the appellate court will not disturb it if not grossly disproportionate to the injury.—*Gerhart v. Metropolitan St. Ry. Co.*, Mo., 112 S. W. Rep. 12.

6. **Assignment for Benefit of Creditors.**—Sale by Trustees.—That trustees under a deed and assignment for the benefit of creditors did not advertise the property held no ground for avoiding their sale.—*Whitman v. McIntyre*, Mass., 85 N. E. Rep. 426.

7. **Attorney and Client—Compensation for Services Rendered.**—If an attorney's compensation is stipulated, and he without just cause abandons his client before the proceeding for which he was employed has been conducted to a termination, he forfeits his right to compensation for services rendered.—*Young v. Lanznar*, Mo., 112 S. W. Rep. 17.

8. **Bailment—Gratuitous Bailment.**—A deposit of \$1,000, made by plaintiff with his brother, placed in an envelope marked as plaintiff's prop-

erty and put in a safe is a gratuitous bailment, entailing no liability except for gross negligence.—*Stevens v. Stevens*, Mo., 112 S. W. Rep. 35.

9. **Bankruptcy—Agreements Made Before Four Months Period.**—The fact that a transfer of property by a bankrupt to a creditor to be applied on an antecedent debt made within four months prior to the bankruptcy, was pursuant to an agreement made before the four-month period, will not prevent its recovery by his trustee.—*Vitzthum v. Large*, U. S. D. C., N. D. N. Y., 162 Fed. Rep. 685.

10. **Concealment of Property.**—The omission by a bankrupt from his schedules, under advice of counsel, of property claimed by another and the ownership of which was at least doubtful, cannot be held to be such a fraudulent concealment as to bar his right to a discharge.—*In re Alleman*, U. S. D. C., N. D. Pa., 162 Fed. Rep. 693.

11. **Discharge.**—A discharge in bankruptcy not pleaded as a defense in a suit involving liabilities cut off by the discharge held not a defense to the execution sale under a judgment rendered in such suit.—*Stone v. Schneider-Davis Co.*, Tex., 112 S. W. Rep. 133.

12. **Exemptions.**—Under Code Civ. Proc. Neb. sec. 530, a bankrupt who is a dealer in eggs and poultry is entitled to hold as exempt as tools and instruments of his business a horse, harness, and wagon used in gathering such produce, and the appliances necessary to be used in conducting his business.—*In re Conley*, U. S. D. C., D. Neb., 162 Fed. Rep. 806.

13. **Exemptions.**—Furniture, such as dishes, counters, stools, ranges, and the like, used in conducting a restaurant, is not exempt from forced sale under Rev. St. 1895, art. 2397, subd. 3, exempting all "tools, apparatus and books, belonging to any trade or profession."—*Stone v. Schneider-Davis Co.*, Tex., 112 S. W. Rep. 133.

14. **F frivolous Appeal.**—A second appeal in a bankruptcy proceeding, raising the same question determined in a former appeal, would be dismissed as frivolous.—*In re Kehler*, U. S. C. of App., Second Circuit, 162 Fed. Rep. 674.

15. **Involuntary Proceedings.**—A court of bankruptcy held to have jurisdiction to proceed with the hearing of a petition in involuntary bankruptcy where the alleged bankrupt failed to comply with orders for the amendment of pleadings, or to appear in response to an order to show cause.—*Young & Holland Co. v. Brande Bros.*, U. S. C. C. of App., First Circuit, 162 Fed. Rep. 663.

16. **Jurisdiction.**—A District Court as a court of bankruptcy has jurisdiction of a suit in equity by a trustee in bankruptcy of a corporation against a number of defendants to recover unpaid subscriptions to the stock of the corporation; such suit being one which could not have been maintained by the bankrupt.—*Skillin v. Magnus*, U. S. D. C., N. D. N. Y., 162 Fed. Rep. 689.

17. **Preferences.**—Release of a bankrupt's right of redemption from a deed to land which was in fact a mortgage, where the value of the land was less than the amount of the debt, held not to create a fraudulent preference.—*Sears v. Gilman*, Mass., 85 N. E. Rep. 466.

18. **Provable Debts.**—A note given by a bankrupt corporation to a stockholder for money borrowed with which to effect a composition, and which was so used, is not without consider-

ation, and may be proved as a debt in a second bankruptcy proceeding.—*In re C. H. Bennett Shoe Co.*, U. S. D. C., D. Conn., 162 Fed. Rep. 691.

19.—Questions Not Raised at Trial.—The capacity of a bankrupt's trustee to sue, not having been challenged in the trial court, cannot be raised on appeal.—*Knapp v. Milwaukee Trust Co.*, U. S. C. C. of App., Seventh Circuit, 162 Fed. Rep. 675.

20.—Surcharging Account.—A receiver in bankruptcy held properly surcharged with the amount realized from the sale of fixtures of one of the bankrupt's places of business, but not for the value of supplies on hand, nor for the difference between the appraised and sale value of the fixtures in another place of business belonging to the estate.—*In re Consumers' Coffee Co.*, U. S. D. C., E. D. Pa., 162 Fed. Rep. 786.

21. **Banks and Banking**—Forged Checks.—Where a party forging a check was a stranger to the drawee and the person receiving the money on the check, and they were equally innocent, the drawee must stand the loss.—*Trust Co. of America v. Hamilton Bank of New York City*, 112 N. Y. Supp. 84.

22. **Bills and Notes**—Bona Fide Purchaser of Forged Note.—Where the indorsement of the payee of a bill of exchange has been forged, subsequent holders obtain no title to it, and payments made to one holding under such forged indorsement may be recovered.—*Trust Co. of North America v. Hamilton Bank of New York City*, 112 N. Y. Supp. 84.

23.—Notice of Dishonor.—An owner of a note who has placed the same with another for collection held not bound either to personally notify the indorser of dishonor, or to make inquiries as to where the indorser received his mail.—*Vogel v. Starr, Mo.*, 112 S. W. Rep. 27.

24. **Boundaries**—Establishment.—Where a lost corner cannot be definitely established by other means, the original location, as shown by surveys based on other established corners of the same original survey, should control.—*Leathers v. Oberlander*, Iowa, 117 N. W. Rep. 30.

25. **Carriers**—Contributory Negligence.—In an action for injury to a passenger caused by a jerking of a caboose, whether she was guilty of contributory negligence in going out on the back platform held for the jury.—*St. Louis, I. M. & S. Ry. Co. v. Richardson*, Ark., 112 S. W. Rep. 212.

26.—Emergency.—In the sudden and unexpected starting of a street car while a passenger is attempting to board, there is presented an emergency; an "emergency" being a sudden or unexpected happening or occasion calling for immediate action.—*Burger v. Omaha & C. B. St. Ry. Co.*, Iowa, 117 N. W. Rep. 35.

27.—Liability as Warehouseman.—Where goods are delivered to a carrier not for immediate transportation, the carrier's liability is measured by the principles governing a depositary or bailee.—*St. Louis, I. M. & S. Ry. Co. v. Citizens' Bank of Little Rock*, Ark., 112 S. W. Rep. 154.

28. **Chattel Mortgages**—Seizure of Intermingled Logs.—Where a mortgagee of logs seized the mortgaged logs and others belonging to another, it was not liable to the mortgagor or his assignee for any of its acts with reference to the logs not mortgaged.—*Croze v. St. Mary's Canal Mineral Land Co.*, Mich., 117 N. W. Rep. 81.

29. **Compromise and Settlement**—Validity of Agreement.—Validity of contract of compromise by which disinherited heir promised not to contest will in consideration of sharing estate held not to depend upon showing that the disinherited heir had a fair chance of success in contesting the will.—*Blount v. Dillaway*, Mass., 85 N. E. Rep. 477.

30. **Constitutional Law**—Construction.—Where a statute or constitution, after having been construed, is re-enacted without material change, such construction becomes a part thereof.—*Pittman v. Byars*, Tex., 112 S. W. Rep. 102.

31.—Delegation of Legislative Powers.—*Laws 1905*, p. 408, c. 273, authorizing detachment of agricultural lands from villages, held unconstitutional as a delegation of legislative power to the courts.—*In re Brenke*, Minn., 117 N. W. Rep. 157.

32.—Due Process of Law.—Code Civ. Proc. Sec. 438, authorizing substituted service in an action against a foreign corporation, is not a violation of Const. U. S. Amend. 14, as not due process of law.—*Grant v. Greene*, 111 N. Y. Supp. 1089.

33.—Regulation of Insurance.—*St. 1907*, p. 595, c. 576, Sec. 75, held not unconstitutional as conferring on the insurance commissioner power to pass on forms of insurance policies to be issued in the state.—*New York Life Ins. Co. v. Hardison*, Mass., 85 N. E. Rep. 410.

34. **Contracts**—Breach of Contract.—Plaintiff, though declaring on a building contract, may recover only on the account annexed, and defendant not having been deprived of the protection and benefit of the contract, the amount recoverable is limited to the agreed price, after deducting payments and damages suffered because of plaintiff's breach.—*Norcross Bros. Co. v. Vose*, Mass., 85 N. E. Rep. 468.

35.—Stipulations in Building Contracts.—Where a remedy for the happening of a condition has been provided for in the contract, the presumption is that the parties intended the prescribed remedy as the sole remedy.—*Goss v. Northern Pac. Hospital Assn. of Tacoma*, Wash., 96 Pac. Rep. 1078.

36. **Corporations**—Articles of Incorporation.—Articles authorizing a corporation to engage in the business of rendering public service in the municipality do not authorize the corporation to use privileges and franchises that may be conferred by the municipality.—*State v. Tampa Waterworks Co.*, Fla., 47 So. Rep. 358.

37.—Sale of Stock.—Where the seller of corporate stock guaranteed "that the liabilities of said" company "do not exceed by more than \$100" a certain amount, he was liable thereon for the amount of the excess of liabilities over that set forth less \$100.—*Childs v. Krey*, Mass., 85 N. E. Rep. 442.

38.—Unpaid Stock Subscription.—The unpaid subscriptions of corporate stock form a part of the assets of the corporation to which the holders of its bonds may look for satisfaction of their claims.—*United States & Mexican Trust Co. v. Delaware Western Const. Co.*, Tex., 112 S. W. Rep. 447.

39. **Costs**—Tender.—A justice's docket held to show a valid tender so that on plaintiff's failure to recover more than the sum tendered on an appeal to the circuit court costs should have been taxed against him.—*Shafstall v. Downey*, Ark., 112 S. W. Rep. 176.

40. **Counties**—Liability for Torts.—A county is not liable for the tortious acts of its officers even when engaged in the performance of their

duties, unless made so by statute.—*Talbott v. Board of Com'rs. of St. Joseph County, Ind.*, 85 N. E. Rep. 376.

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44. **Criminal Trial**—Degree of Offense.—Where a person is acquitted of a higher grade of an offense, such acquittal only bars a subsequent conviction for the degree of the offense for which he was acquitted on any higher grade.—*Burnett v. State*, Tex., 112 S. W. Rep. 74.

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48. **Dedication**—Reversion.—Where land has been dedicated to the public for cemetery purposes, if there be an abandonment of the graveyard, the right of the public, which is in the nature of an easement, ceases, and the land reverts to the original owner or his grantees.—*Tracy v. Bittle*, Mo., 112 S. W. Rep. 45.

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50. **Divorce**—Custody of Children.—A judgment of divorce awarding to the wife the custody of the children held a mere judicial determination that she shall have the preference legal right to their custody.—*Sykes v. Speer*, Tex., 112 S. W. Rep. 422.

51. **Desertion**.—It is essential to desertion

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52. **Disposition of Property**.—A married woman abandoned by her husband held entitled to acquire a domicile elsewhere than in the state where their domicile was at the time of her abandonment and obtain a divorce in the courts of such new domicile.—*Buckley v. Buckley*, Wash., 96 Pac. Rep. 1079.

53. **Homestead**.—The duty of a husband to support his children, notwithstanding a divorce awarding to the wife the custody of the children, held to constitute the husband and children, when living together, a family entitled to a homestead.—*Sykes v. Speer*, Tex., 112 S. W. Rep. 422.

54. **Ejectment**—Defenses.—A landowner who stands by and sees a railroad constructed on his land by a company having the power of eminent domain without preventing the construction acquiesces therein and cannot recover the land in ejectment.—*Union Sawmill Co. v. Felsenthal Land & Townsite Co.*, Ark., 112 S. W. Rep. 205.

55. **Eminent Domain**—Injury to Surrounding Land.—The use of soft coal in a municipal pumping plant, to the serious injury to property in the neighborhood, held to constitute an appropriation of such property for which the owners thereof may recover damages.—*Gordon v. Village of Silver Creek*, 112 N. Y. Supp. 54.

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82. **Defective Machinery.**—A servant thoroughly experienced in the work, who continues to operate a defective machine, without promise on the part of the master of guaranty against injury or of mending the machine, assumes the risk, where he has full knowledge of the defect and of its effect on the operation of the machine.—*Continental Oil & Cotton Co. v. Scott*, Tex., 112 S. W. Rep. 107.

83.—Fellow Servants.—Where the hook tender who attached hooks for the purpose of raising the log which fell on plaintiff, and the operator of the crane by which it was raised, were mere operatives, charged with the performance of no positive duty which the master owed to plaintiff, they were fellow servants of plaintiff, for whose negligence the master was not liable.—*Allen v. Standard Box & Lumber Co.*, Or., 96 Pac. Rep. 1109.

84.—Fellow Servants.—A telegraph operator in charge of a block signal, and in absolute control of the operation of trains within such block, held a vice principal, and not a fellow servant, of a trainman killed in a collision due to the operator's negligence in permitting a train to proceed while the block was occupied.—*Salmons v. Norfolk & W. Ry. Co.*, U. S. C. C., S. D. W. Va., 162 Fed. Rep. 722.

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